163 U.S. 612

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 692.

ELI LUCAS, PLAINTIFF IN ERROR,

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in case of—

UNITED STATES
vs. } Indictment for murder. No. 112.
ELI LUCAS.

1 *Indictment.*

United States of America, western district of Arkansas. In the circuit court, Feb. term, A. D. 1895.

UNITED STATES
vs. } Murder.
ELI LUCAS.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Eli Lucas on the 1 day of Oct., A. D. 1894, at the Choctaw Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms in and upon the body of one Levy Kemp, a negro and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Eli Lucas with a certain gun then and there charged with gunpowder and one leaden bullet which said gun he the said Eli Lucas in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said Levy Kemp, and that the said Eli Lucas, with the leaden bullet aforesaid, out of the gun aforesaid, then and there by force of the gunpowder aforesaid by the said Eli Lucas discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him the said Levy Kemp in and upon the body of him the said Levy Kemp, giving to him the said Levy Kemp then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Eli Lucas, in and upon the body of him the said Levy Kemp, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he the said Levy Kemp then and there instantly died. And so the jurors aforesaid upon their oath aforesaid do say that the said
2 Eli Lucas him the said Levy Kemp, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

2nd count.—The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That Eli Lucas, on the 1 day of Oct., A. D. 1894, at the Choctaw Nation,

in the Indian country, within the western district of Arkansas aforesaid, with force and arms in and upon the body of one man whose name is to the said grand jurors unknown, a negro and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Eli Lucas, with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he, the said Eli Lucas, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said man whose name is to the said grand jurors unknown; and that the said Eli Lucas, with the leaden bullet aforesaid out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Eli Lucas discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him the said man whose name is to the said grand jurors unknown in and upon the body of him the said man whose name is to the said grand jurors unknown, giving to him the said man whose name is to the said grand jurors unknown then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Eli Lucas, in and upon the body of him the said man whose name is to the said grand jurors unknown one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he the said man whose name
3 is to the said grand jurors unknown then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Eli Lucas him the said man whose name is to the said grand jurors unknown, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 112. United States vs. Eli Lucas. Murder. A true bill. L. H. Southmayd, foreman. Witnesses: Hannah Sockey, San Bois, I. T.; Mack King, John Le Flore, John Jones, John Ellis, Noah Holbrook, Panther, I. T.; Steve McGilberry, Iron Bridge, I. T.; Jerry Folsome, Panther, I. T.; C. C. Ward, Milton, I. T. Filed in open court Feb. 15, 1895. Stephen Wheeler, clerk. By I. M. Dodge, D. C.

4 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, Feb. term, 1895, Friday morning, 8½ o'clock, Feb. 15, 1895.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES }
vs. } Indictment for murder. No. 112.
ELI LUCAS. }

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defend-

ant in custody of the marshal and makes known to the court that he is destitute of means and wholly unable to employ counsel to defend him in this cause. Whereupon J. K. Barnes and Jas. B. Rutherford were appointed by the court to defend him herein, and the said defendant having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him, how he would acquit himself thereof he says he is not guilty as charged in said indictment, and puts himself upon the country.

Whereupon, by order of the court, this cause was set down for trial March 16, 1895.

FRIDAY, *March 8, 1895.*

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

5 Said application coming on to be heard and the court being fully advised in the premises doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Houston Nelson, Henry Gains, Cornelius Brandy, Jo Brown, Wallace Jefferson, Charley Brandy, Isaac King, Mrs. Isaac King, Hollis James, Challis Wade, Betsey Nale, Joseph Burus, Simeon Talapush, Joshua Lucas, Tecumseh and Simon Johnson in behalf of said defendant be paid by the United States and that a subpœna be issued for them returnable March 16, 1895.

WEDNESDAY, *Mch. 27, 1895.*

(Caption omitted.)

On this day, on motion of the district attorney, because of the sickness of prosecuting witness Jerry Folsom, it is ordered by the court that this cause be, and the same is hereby, continued to the May term, 1895, and set down for trial May 27, 1895.

THURSDAY, *June 7, 1895.* May term, 1895.

(Caption omitted.)

On this day, on motion of defendant's attorney, it is ordered by the court that an attachment be issued for Mrs. Ring and Simon Johnson, returnable forthwith, to show cause why they should not be punished for contempt for failing to appear as witnesses in this cause when duly summoned thereto.

FRIDAY, *June 7, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, J. K. Barnes, esq., and J. B. Rutherford, esq., and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete

6 list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore; and having heretofore had hearing of said indictment and pleaded not guilty

thereto, it is, on motion of plaintiff, by its attorney, ordered that a jury come to try the issue joined. Whereupon, after counsel for both plaintiff and defendant had exercised in the presence of the defendant their full right of challenge under the law, the following jurors were selected for the trial of this cause, to wit: Ben. F. Hackett, John Johnson, William Werner, Levi P. Boren, Elmo T. Lusk, Dennis P. Mosley, Thos. B. Brown, Wm. H. Clark, Michael O'Connell, Wilshire Pruett, Joseph A. Fallen, Wm. R. Gabbard.

Twelve good and qualified electors of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a portion of the evidence and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court. And it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

SATURDAY, *June 8, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorneys, J. K. Barns, esq., and J. B. Rutherford, esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Ben. F. Hackett, John Johnson, Elmo T. Lusk, Dennis P. Mosley, Michael O'Connell, Wilshire Pruett, William Werner, Levi P. Boren,
Thos. B. Brown, Wm. H. Clark, Joseph A. Fallen, Wm. R.
7 Gabbard, who took their seats in the jury box, and after hearing the remainder of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

MONDAY, *June 10, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorneys, Jas. K. Barnes, esq., and J. B. Rutherford, esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Ben. F. Hackett, John Johnson, William Werner, Levi P. Boren, Elmo T. Lusk, Dennis P. Mosley, Thos. B. Brown, Wm. H. Clark, Michael O'Connell, Wilshire Pruett, Joseph A. Fallen, Wm. R. Gabbard, who took their seats in the jury box and heard the argument of counsel and received the charge of the court, to which charge the defendant, by his counsel, filed his exceptions, whereupon said jury retired in charge of the sworn bailiff aforesaid to consider of their verdict.

TUESDAY, *June 11, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorneys, J. K. Barnes, esq.,

and J. B. Rutherford, esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Ben. F. Hackett, John Johnson, Elmo T. Lusk, Dennis P. Mosley, Michael O'Connell, Wilshire Pruett, William Werner, Levi P. Boren, Thos. B. Brown, Wm. H. Clark, Joseph A. Fallen, Wm. R. Gab-
8 bard, who were brought into court for further instructions, which were given by the court and exceptions to the same filed by counsel for the defendant; whereupon said jury retired to further consider of their verdict, and after some time returned into court the following verdict, to wit:

"We, the jury, find the defendant, Eli Lucas, guilty of murder as charged in the 1st count of the within indictment."

(Signed) "B. F. HACKETT, *Foreman*."

On motion of defendant's attorney the jury was polled and each answered for himself that the verdict as read by the court was his verdict. Whereupon, by order of the court, said jury was discharged from the further consideration of the case, and the said defendant was remanded to the custody of the marshal to await final sentence.

THURSDAY, *June 22, 1895.*

(Caption omitted.)

On this day come the defendant, by his attorney, Jas. K. Barnes, esq., and files his motion to set aside the verdict of the jury and for a new trial in this cause.

TUESDAY, *July 9, 1895.*

(Caption omitted.)

On this day come on to be heard the motion heretofore filed to set aside the verdict of the jury and for a new trial in this cause, and the court being well and sufficiently advised in the premises, doth overrule the same, to which defendant at the time excepted.

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, Eli Lucas, was brought to the bar of the court in custody of the marshal of this district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him on the 11th day
9 of June, 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said Eli Lucas be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said Eli Lucas to be taken hence, and him the said Eli Lucas safely and securely keep from the date hereof until Tuesday, the 1st day of Oct., A. D. 1895, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Eli Lucas to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock

in the afternoon on Tuesday, the said 1st day of October, in the year of our Lord one thousand eight hundred and ninety-five, cause the said Eli Lucas to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor. And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal, with a full and true account of the execution of the same.

FRIDAY, *July 14, 1895.*

(Caption omitted.)

Comes defendant, by his attorney, Jas. K. Barnes, esq., and presents his bill of exceptions, and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

And at the same time presents his assignment of errors and petition for writ of error to the Supreme Court of the United States,
10 together with his petition supported by affidavit praying for an appeal in this cause at the expense of the United States, which assignment and petition, &c., are ordered filed.

SATURDAY, *July 13th.*

(Caption omitted.)

On this day comes the clerk of this court and makes known that a writ of error taking this case to the Supreme Court of the United States has been issued by him.

It is therefore hereby ordered by the court that execution of sentence heretofore pronounced in this cause be stayed pending the action of the Supreme Court.

11 In the circuit court of the United States for the western district of Arkansas.

UNITED STATES	)	
vs.		Murder.
ELI LUCAS.	)	

Be it remembered, that on the 7 day of June, 1895, the same being a day of the May term of the United States circuit court for the western district of Arkansas, come on to be heard the above-entitled cause, when the following proceedings were had, to wit:

A jury of twelve good and lawful men were duly empaneled, sworn, and charged to try the issues joined in the above-entitled cause.

And the Government, to maintain the issues upon its part, produced and examined the following-named witnesses, to wit: John Le Flore, Noah Holbrook, C. B. Ward, Hannah Sockey, Stephen McGillberry, Mack King, Jerry Fullsom, John Jones, John Ellis, who testified, respectively, as follows:

12 JOHN LE FLORE, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. Near Panther.

Q. In what nation?
A. Choctaw Nation.
Q. How far from Ft. Smith?
A. I think it is called 50 miles; I am not certain.
Q. Did you know a man named Levi Kemp that worked at your place?
A. Yes, sir; I saw him a time or two. He staid with me a little while.
Q. Was he a negro?
A. Yes, sir.
Q. When did he come to your place?
A. I think it was along in August when he first came to my place.
Q. August of what year?
A. 1894.
Q. How long did he stay with you?
A. He staid around me some two or three weeks. I would not be certain just how long.
Q. What did he do for you?
A. He just done chores around there—around the place awhile.
Q. What name did he give you as his name?
A. Levi Kemp.
Q. Where did he say he was from?
A. He said he was from near Little Rock; a place named Mount Kamp.
Q. Little Rock, Arkansas?
A. Yes, sir.
Q. Go on and tell the circumstances about his leaving.
A. Well, he staid around me a while, and my family seemed to be afraid of him. It seemed that he did not have very good sense—what I would call an idiot—and one day Mr. Cupp was going over to Panther to the blacksmith shop for me after a wagon wheel, and he said he would take him over there and put him on the big road there and he could go
13 on somewhere else, and he put him in the wagon and carried him over there.
Q. Was he ever at your place after that?
A. Yes, sir; he came back there once after that, I believe.
Q. When was that?
A. I think that was in September, maybe; I would not be positive.
Q. Did he get a meal there?
A. Yes, sir; he eat dinner there, and left again after dinner.
Q. When he left after dinner which way did he go?
A. He went back across the prairie there right in front of my place to Mr. Bumm's place.
Q. Do McGillberys live in that direction?
A. No, sir; that is very near west. McGillbery lives south of me a little.
Q. He went off in the direction of that pasture?
A. Yes, sir; and he got very near to the pasture, and he turned in south direction, and taken the road—I suppose he taken the road.
Q. That would lead him in the direction of McGillberys, would it not?
A. Yes, sir; very near in that direction.

Q. On that day do you know whether there was any ball play in that neighborhood or not?

A. I heard there was.

Q. You were not at the ball play yourself?

A. No, sir.

Q. Did you ever see Levi Kemp after that?

A. No, sir.

Q. Did you ever see any part of his remains after that?

A. I saw some bones, skeleton, and some clothing that I recognized the pants to be the pants that I had given him while he was staying with me.

Q. You gave him a pair of pants while he was staying at your house?

A. Yes, sir.

Q. Where did you see these bones and pants?

A. In the woods, about a mile and a half from my place, near Stephen McGillbery's place.

Q. Was it in the general direction he had gone?

A. Well, from where he had turned on the prairie and went across, very nearly in that direction; not exactly, either.

14 Q. When was it you saw the bones and pants?

A. That was some time in December, I believe. I would not be positive of the date, but somewheres between the 10th and 15th of December, I think.

Q. Where did you say you saw them?

A. They were out in the woods, on a timber ridge near the edge of the prairie.

Q. Was there anybody with you when you went to look at them?

A. Yes, sir; Mr. Holbrook was with me.

Q. How did you know they were there?

A. Jonas Thompson came to my house and told me they had found a skeleton there.

Q. You were not with the first crowd that found them?

A. No, sir; I saw them after they were piled up.

Q. Holbrook is here, is he?

A. Yes, sir.

Q. Was he working for you at the time Levi Kemp was there?

A. No, sir; he wasn't working for me at the time, but he was about my place several times.

Q. Were you ever acquainted with Levi Kemp before he came to your place?

A. No, sir.

Q. Had he ever lived in that country?

A. He told me he had not.

Mr. JAMES K. BARNES (of counsel for defendant). I object to that question, and I object to the answer, and I ask that it be excluded from the jury. He asked the witness what this man told him, and he is relating that.

The COURT. What was the question?

Mr. JAMES K. BARNES (of counsel for defendant). He asked the witness if Kemp lived in that country and he said he didn't know.

The WITNESS. I said he told me that he did not.

The ASSISTANT DISTRICT ATTORNEY. He said he did not.

Mr. JAMES K. BARNES (of counsel for defendant). And he said he came from Little Rock, did he?

The WITNESS. That is what he told me.

15 The COURT. I think that is competent.

Mr. JAMES K. BARNES (of counsel for defendant). I object to that, and I ask that the objection be noted.

The ASSISTANT DISTRICT ATTORNEY. That was some time ago. He did not object to all of that.

The COURT. Yes; you did not object at the time. It went in, and you did not object. That was about the first question that was asked and answered.

Mr. JAMES K. BARNES (of counsel for defendant). I did not understand it that way.

The ASSISTANT DISTRICT ATTORNEY. He went on to say that he came from near Little Rock—what was that place?

The WITNESS. He said a place near Little Rock, near a place called Mount Kamp.

Mr. JAMES K. BARNES (of counsel for defendant). I object to everything about what the man said about where he came from and who he was.

The ASSISTANT DISTRICT ATTORNEY. In what condition was the pair of pants that were there where the bones were?

A. They were right smartly torn up. I think the legs were torn in two, and separated from each other—each leg was to itself. They were right smartly damaged—dirty and torn up.

Q. You state you recognized that as a pair of pants you had given Levi Kemp while he was with you?

A. Yes, sir.

Q. Did you see the bones and skull?

A. Yes, sir.

Q. See if the skull I now show you was the skull that was there? (Showing witness a skull with leather strap tied to it.)

A. Yes, sir; that is the skull.

Q. Did you bring these bones here?

A. Yes, sir.

Q. Are they the ones that were picked up there at that place?

16 A. Yes, sir; I think they are.

Q. Is this the remains of the pants that I now show you?

A. Yes, sir; that is the pants.

Q. Are they now like they were at that time or not?

A. Yes, sir; I think they are.

Q. Were they all wadded up in that shape?

A. Yes, sir; when I saw them, they were. They had been piled up before I got there.

Q. Is the shirt I now show you the shirt that was found there or that you saw there?

A. I am not positive about the shirt. I think, maybe, it is.

Q. It was brought here in this condition?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. I want to introduce this shirt in testimony.

Q. And you give him the pants along in September, did you?

A. Well, I expect maybe it was in September. I wouldn't say positive whether it was September or August when I give him the pants. I give them to him while he was there, though.

Q. I will ask you if you did not state before the commissioner that you never saw him after he left your house the first time; and did you not fail to state that he came back there and got dinner?

A. I don't remember whether I did or not, Mr. Barnes.

Q. Didn't you state after he left your house that you heard of him two or three days after that?

A. Yes, sir; I heard of him over there about Panther.

Q. How far from Panther?

A. I heard of him once right there—you might say right there
20 at Panther. I heard he was there in Mr. Selee's (?) field. I heard some of the neighbors say he was over there in Mr. Selee's field.

Q. Where else did you hear of him?

A. I heard of him going to Mr. Shehan's.

Q. Where else?

A. I don't remember of hearing of him being at any other place until I heard he was dead, or killed.

Q. You found these bones upon the 12th of December, didn't you?

A. I think it was somewhere between the 10th and the 15th; I would not be positive just to the date.

Q. You were before the commissioner, and you knew the date at that time, didn't you? You stated it was upon Thursday, the 12th of December last, didn't you?

A. I don't remember whether I did or not.

Q. What time in the day did you go to look for these remains?

A. It was in the evening I went to look at them.

Q. About 2 or 3 o'clock, was it not?

A. Well, I don't remember just what time of day it was, but it was in the evening. It was afternoon, though.

Q. You found these pieces of pants there, and some pieces of shirt, did you?

A. Yes, sir.

Q. I will ask you if you did not state before the commissioner that this man left your place the last of September?

A. I don't remember that I did.

Q. I will read you this question just to refresh your memory now: "Q. How long did he leave your place before the bones was found?—A. I think he left my place about the last of September."

A. I don't remember it. It may have been, possibly, though.

Q. What time do you say now he left?

A. I would not be positive about what time he left there. It was some time in September, I think.

Q. You were a witness here upon the 21st of December, were
21 you not, soon after the bones were found?

A. I was here in December; I do not remember the date, though.

Q. How came him to leave your house?

A. The first time he left my house, as I stated just now, my family seemed to be afraid of him; my wife didn't want him about the place, she said, and I would be away a good deal.

Q. Why didn't you tell that before the commissioner? I will ask you if you did not assign this reason before the commissioner when you were examined: Didn't you tell him that you let him go because you did not need him any more?

A. Well, I didn't need him; I hadn't anything for him to do.

Q. After he left your place you say you heard of him two or three times?

A. Yes, sir; twice that I remember of. I heard Selees' folks say he was over there.

Q. You were asked about that before the commissioner, wasn't you; and didn't you state in response to a question as to when he left your house, and if you heard of him any more, didn't you say an old Choctaw saw him, that you heard of him two or three times after that?

A. I do not remember that I did.

Q. I will ask you first how far you live from Hannah Sockeys?

A. A mile and a half, or two miles, maybe.

Q. How far do you live from the place where the pants were found, and the bones?

A. The bones were found between my place and hers, I reckon something near half a mile from her house.

Q. Where did the defendant live at that time?

A. I could not be positive about where he lived. I think, maybe, he was stopping at about Jerry Fullsom's, or Mrs. Bohanan's, or San Bois, somewhere around in there.

Q. When you were a witness here hadn't he moved over to San
22 Bois, 12 or 15 miles?

A. Yes, sir; I think he did.

Q. When that darky left your place, where was this defendant staying?

A. I could not tell you, for I hadn't seen him for a long while.

Q. He had been in the habit of coming around your place, had he?

A. No, sir; I don't know that he ever was at my place.

Q. Or in the neighborhood there?

A. I had heard of him being around in the neighborhood there. I could not say that he was, positive'.

Q. How far did you find or see these from where Jerry Fullsom lives?

A. Well, it must be two or three miles, maybe three and a half, or somewhere along there; I could not say just exactly.

Q. So far as your knowledge extends you don't know that this boy ever saw that man, do you?

A. No, sir; I could not say that he ever saw him. I never saw him with him.

Q. He never saw him while he was at your house, did he?

A. Not as I know of.

Q. I will ask you if other parties had not been there before you visited the remains?

A. Yes, sir; I said the bones were found and piled up before I went there, and they came and told me and asked me to go over there.

Q. One party was over there in the morning. There were some parties over there that morning, wasn't they?

A. I think it was that morning.

Q. And one of those parties that were over there in the morning came and told you about it?

A. Yes, sir; Jonas Thompson is the man.

Q. Is he here?

A. I think he is here.

Q. He was here before the commissioner, was he not?

A. Yes, sir.

Q. He came and told you about it, and you and Holbrook went over there, didn't you?

A. Yes, sir.

Q. You went over there in the afternoon?

A. Yes, sir.

Q. Had the bones been handled?

23 A. They were piled up just at the root of a little black-jack tree, and some loose rock laid over them.

Q. Didn't you all lay the rock over them?

A. No, sir.

Q. This other party put the rock on them?

A. I guess so; they were all there when I got there.

Q. They had been piled up there and the rock put over them?

A. Yes, sir; that is the way Thompson told me they had fixed them, and we found them that way.

Q. You didn't put the rock on them, but it was the other party put the rock on them?

A. I suppose so; that is what he said.

Q. Who was that man you got the pants from that you give to the colored man?

A. A man named Albert Perry that worked for me.

Q. Where is he?

A. The last time I heard of him he was up to Texanna, in the Creek Nation.

Q. You say this man give them to you?

A. He left them at my place. He said he didn't want them; he could not carry them with him.

Q. When did he leave them there?

A. It was some time in August after crops were laid by; he worked for me in crops.

Q. What sized man was this man Perry?

A. He was a man about my height, maybe a little higher, right smart heavier than I am, and thicker.

Q. When did he come to your house?

A. He had been around in the country there four or five years. He commenced working for me, though, maybe in February.

Q. Commenced working for you last February a year ago; February, 1894?

A. Yes, sir; I think it was.

Q. How long did he work for you?

A. All through the crop season until the crops were laid by.

Q. When did he leave your place?

A. I think it was in August; I could not say just what time.

Q. You paid him, didn't you?

24 A. Yes, sir; he staid there a while after I paid him up.

Q. Did he leave there the first of August, the middle of August, or the last of August?

A. I think it was along towards the middle of August, maybe.

Q. Along towards the middle of August. Then how long had he been gone before this colored man came there?

A. I don't think he had been gone but just a little while, as well as I remember.

Q. You don't think he had been gone but a little while before he came there, and then that colored man staid there two or three weeks?

A. Yes, sir.

Q. How long had the colored man been there before you gave him the pants?

A. I think it was, maybe, the next day after he came there.

Q. Didn't give him that shirt, did you?

A. No, sir.

Q. Did he have any boots or shoes?

A. No, sir; he was barefooted.

Q. Came there barefooted?

A. Yes, sir.

Q. Did he go away barefooted?

A. Yes, sir.

Q. And bareheaded?

A. Yes, sir.

Q. And you wanted to get rid of him?

A. Yes, sir.

Q. Your wife was afraid of him?

A. Yes, sir; she seemed to be afraid of him.

Q. You wanted to get rid of him, and your wife was afraid of him?

A. Yes, sir.

Q. You are a Choctaw?

A. Yes, sir.

Q. Which direction did he go when he left your house?

A. When Mr. Cupp carried him off?

Q. When he left your house, which direction did he go? Who carried him off?

A. A man by the name of Cupp.

Q. What is his given name?

A. Lem Cupp.

25 Q. Is Cupp a Choctaw?

A. No, sir; he is a white man.

Q. You sent him off with him?

A. Yes, sir; he carried him off in a wagon.

Q. Where was he taking him to?

A. Over to the blacksmith shop at Panther.

Q. What time in the day did he leave your house?

A. I think it was in the morning that time.

Q. He took that man off in a wagon?

A. Yes, sir.
Q. How far is Panther from your house?
A. It is three or four miles from my place.
Q. He left to go to Panther, as I understand you?
A. Yes, sir.
Q. You didn't go with him?
A. No, sir.
Q. Did you go any of the way with him?
A. No, sir.
Q. What direction is Panther from your house?
A. Well, it is a southwest direction.
Q. Did you give him anything to take along to eat?
A. No, sir; I didn't give him anything.
Q. Did he have any money?
A. Not as I know of.
Q. What age man was he?
A. He looked to be a man about 30.
Q. How large a man was he?
A. He was a small man; I guess he would weigh 150, maybe; I don't know.
Q. As large a man as you?
A. Yes, sir; a little larger than I am.
Q. Where is Mr. Lem Cupp now?
A. He is at home.
Q. How far does he live from you?
A. He lives about a mile and a half or two miles from me.
Q. Did you ever say anything about sending this man off with Mr. Kupp before? You were before the commissioner, and you never told that, did you?
A. I don't know; I don't remember whether I did or not.

26 Q. Now, I will ask you if you did not state there that you told the man you did not need him any more, and he left, and didn't you fail to state that he went off with Cupp, and didn't you fail to state that he ever came back to your house?

A. I could not say whether I did or not.
Q. How long had he been gone before he came back to your house?
A. I never paid any attention to the time that he was gone.
Q. You can give some estimate, can't you? You never told us about it before. You might give us some estimate now.
A. He was gone something like two weeks.
Q. Before he came back?
A. Yes, sir.
Q. Then why was it you stated after he left your house—why did you tell before the commissioner that an old Choctaw saw him, and you heard of him two or three times after that, and then fail to tell us that he came back to your house about a week after that? Why is it you failed to tell that before the commissioner?
A. Well, I don't know. I don't know whether I told it or not.
Q. Didn't you fail to tell the commissioner that your wife was afraid of that man?
A. I don't know whether I did or not.

Q. Did he come back to your house in the daytime or in the nighttime?

A. In the daytime.

Q. When did you first see him when he came back, and what time in the day did he come back?

A. It was about noon.

Q. When did you first see him?

I saw a crowd coming across the prairie towards the house; I never paid any attention to them; I was busy with my work building a house; I had just moved to a new place, and directly he came up.

Q. You saw a crowd?

A. Yes, sir.

Q. Were they with him?

A. I guess they were with him. I never paid much attention. There was a great deal of passing around there.

27 Q. Were they Indians or white people?

A. I could not tell you whether they were Indians or white people.

Q. You saw him with a crowd, did you?

A. I say I don't know whether he was with the crowd or not, but directly he came on up to the house after I noticed this crowd; I was busy at work on the house and never paid any attention to who it was.

Q. Where did the crowd go to?

A. They went on across the prairie; I don't know where they went to.

Q. Was that the day of a ball play?

A. Yes, sir; I think it was; I heard there was going to be a ball play that day; I don't know whether it was or not. I did not go to it.

Q. Where was that ball play to be?

A. It was on the prairie they call the Iron Bridge Prairie, is what I heard.

Q. Is that the only ball play they had there?

A. I don't know; I don't know how many they had there.

Q. Do you know whether that was in September or October?

A. I think that was in September.

Q. What time in September?

A. I could not say about the date.

Q. You say Panther is southwest of your place?

A. I think it is.

Q. What direction were these bones found from your place?

A. South.

Q. They were found south?

A. Yes, sir.

Q. And Panther is southwest of your place?

A. Yes, sir; I think so.

Q. What direction is Hannah Sockey's from your place?

A. South.

Q. What direction is Jerry Fullsom's from your place?

A. It is southwest. Jerry Fullsom lives at Panther.

Q. Right at Panther?

A. Yes, sir; or he did at that time.

Q. What direction was the ball play from your place; that is,
28 where you heard they were going to have it?

A. It is north; I guess it is north.

Q. How many men were in that crowd you saw?

A. I didn't pay any attention to how many there were.

Q. How long did this darky stay after he eat dinner?

A. Not but just a little while.

Q. How come him to leave? Which direction did he go?

A. He went back towards Bunum's pasture, in the direction of Panther, and when he got away out on the prairie something like half a mile, or maybe a little further, he then turned in a south direction. Some of them remarked about him out on the prairie after he left the house. I was on top of the house at work, and I looked out across the prairie and I saw him turn in a south direction.

Q. Was he in the road or on the prairie?

A. There was an old dim road the way he was going.

Q. Turned in a south direction?

A. Yes, sir.

Q. Did you ever hear of him after that?

A. Not until I heard of his bones being over there in the woods, that I remember of.

Q. You say he only staid there a few minutes after dinner?

A. Yes, sir; I think so.

Q. How come him to go off?

A. There was a boy there came to me and he says, "I am going to tell Levi to leave again." I says, "I ain't caring what you do." I went on to my work and he went on around there and told him.

Q. What boy is that?

A. Ford Brashears.

Q. Is he a Choctaw?

A. He is about a quarter on Choctaw.

Q. Where does he live?

A. He is living at Red Oak. He was staying with me at that time.

Q. Is he here?

A. No, sir; he was here the other day.

29 Q. He told you he was going to tell him to leave there?

A. Yes, sir.

Q. Did Brashears live with you?

A. He did at that time.

Q. And your wife wanted to get the "crazy nigger" away from there?

A. Yes, sir; that was when he went off with Cupp.

Q. Is Brashears any akin to you?

A. He is about a fourth or fifth cousin to me.

Q. You are a Choctaw, ain't you?

A. Yes, sir; half-breed.

Q. Your wife is a Choctaw?

A. No, sir.

Q. White woman?

A. Yes, sir.

Q. You say you never saw this man before he came to your house the first time?

A. No, sir; I don't think I ever did.

Q. You don't think you ever did. Do you know any Kemps in that country?

A. No, sir; I don't believe I do.

Q. Don't you know there are a lot of Kemps scattered all through the Choctaw and Chickasaw nations?

A. I think there is some on Red River, but if there is any in our part of the country I don't know it. Of course there might be. I don't know everybody in the country.

Q. Do you know Isom Kemp?

A. I don't know that I do.

Q. Do you know Lewis Kemp?

A. No, sir; I think not.

Q. Do you know Jesse Kemp?

A. No, sir; I have just heard of Kemps.

Q. You have heard of Kemps in the nation?

A. Yes, sir; I heard of some on Red River, but I don't know of any myself.

Q. Did you ever hear of George Kemp?

A. I don't remember.

Q. Fenton Kemp?

A. No, sir; not as I know of.

Q. And Henry Kemp. Did you ever meet them?

A. No, sir.

Q. But you heard of Kemps on Red River?

A. Yes, sir.

Q. That is in the Choctaw Nation, is it not?

A. Yes, sir.

Q. You have heard of them living down there?

A. Yes, sir.

Q. Don't you know there is lots of Kemps scattered throughout that country?

A. I could not say; there might be.

Q. That it is a numerous Choctaw family?

A. It might be; I could not say. I could not tell you about that, but I am not acquainted with any Kemps.

Q. Do you know how many counties there are in the Choctaw Nation?

A. I think there is about seventeen.

Q. What county do you live in?

A. San Bois County now.

The COURT. This was in San Bois County that this man was missing?

The WITNESS. Yes, sir.

Mr. JAMES K. BARNES (of counsel for defendant). Did you ever wear these pants?

A. No, sir; I never wore them. They did not belong to me.

Q. How long did that man wear these pants before he left your place?

A. I think he wore them nearly all the time he staid there. I don't remember just how long he wore them.

Q. Do you know where the other man got these pants?

A. Yes, sir; he got them from a young man by the name of Bob Westmoreland. Westmoreland bought them, and they were too small for him, and he let this man Perry have them.

Q. None of those parties are here?

A. No, sir.

The COURT. Was there any hat found with these bones?

The WITNESS. Not as I know of.

The COURT. Any shoes?

The WITNESS. Not as I know of.

The COURT. The man had neither hat or shoes, did he?

The WITNESS. He didn't when he left my place.

Mr. JAMES K. BARNES (of counsel for defendant). Where did you pick up this skull?

A. The first time I saw the skull it was there at Jerry Fullsom's.

31 Q. At Jerry Fullsom's?

A. Yes, sir.

Q. Then when you went over there in the afternoon you did not see the skull?

A. No, sir.

Q. And what bones they had there were under a pile of rock?

A. Yes, sir; these pants, too.

Q. I will ask you if you did not see a clean place just off to one side?

A. Yes, sir.

Q. That looked like where he had been lying?

A. Yes, sir.

Q. How far were these pile of bones from that clean place?

A. It was about as far as from here to that chair, I reckon, or maybe not so far.

Q. That clothing that you see here—something that looked like that clothing—that was thrown on top of it, was it not?

A. Well, they were just all mixed up together, and then some old loose rock laid over them up by the side of a tree.

Q. Did they look like they had been freshly laid on there?

A. Yes, sir; I remember some of the rock looked like they had just been taken up out of the ground and laid on them.

Q. Where does Bob Westmoreland live?

A. His father lives up there near Melton. He stays around over the country, first one place and then another.

Q. He is around in the country there?

A. Yes, sir.

Q. Was he at your house at the time that man was there?

A. Well, yes; he was right there in the settlement. He was around there a day or two, I guess.

Q. Perry is up above there at Texanna?

A. He was the last time I heard of him.

Q. When was the last time you heard of him?

A. I think it was in February or March.

32 Q. Where is Brashears?

A. He is at Fanshaw, I reckon, now.

Q. That is right down below here?

A. Yes, sir; on the Choctaw road.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. How do you recognize the pants?

A. I recognize them by the color of them; and then he tore off the bottom of the pants there [indicating] when I gave them to him and rolled them up.

(Witness excused.)

33 NOAH HOLBROOK, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. At Red Oak.

Q. Do you know Mr. John Le Flore?

A. Yes, sir.

Q. Did you know a colored man that was about his house in September?

A. Yes, sir.

Q. Did you know the man's name?

A. No, sir; he never told me his name.

Q. Did you go with Mr. Leflore to the place where the bones were found?

A. Yes, sir.

Q. Was there anything there that you recognized?

A. The pants.

Q. Had you seen the pants before?

A. Yes, sir.

Q. Had you seen the colored man wearing the pants?

A. Yes, sir.

Q. And you recognized the pants you found there as the ones that you had seen on the colored man?

A. Yes, sir.

Cross-examination by Mr. JAMES K. BARNES:

Q. Your name is Noah W. Holbrook?

A. Yes, sir.

Q. Are you a white man?

A. Yes, sir.

Q. Where were you raised?

A. I was raised in the State.

Q. What State?

A. Down in Yell County; mostly raised there.

Q. How long have you been up in the nation?

A. I have been there about 10 or 12 years.

Q. How old are you?

A. I am 28.

Q. Where do your people live?

A. My parents?

34 Q. Yes, sir.

A. They live in the nation, close to Panther—this side of Panther.

Q. Do you live with them?

A. No, sir.

Q. Are you a married man?
A. Yes, sir.
Q. Where did you marry?
A. I married out there in the nation.
Q. Did you marry a white woman?
A. Yes, sir.
Q. How long have you been married?
A. About five years.
Q. Were you ever here on any charge?
A. Yes, sir.
Q. What?
A. Larceny.
Q. What did they do with you?
A. I come clear before the commissioner.
Q. How often have you been here?
A. One time.
Q. What was it—hogs?
A. Cattle is what they had me accused with—stealing a yearling; me and my brother-in-law, Le Flore. They had us accused of stealing a yearling.
Q. Who is your brother-in-law?
A. Le Flore.
Q. John Le Flore?
A. That man that was just in here.
Q. You both come clear?
A. Yes, sir; he bought the yearling and paid for it.
Q. But you were charged with it?
A. Yes, sir.
Q. And you proved out, did you?
A. Yes, sir; I didn't have anything to do with it myself; he was the man that bought it, but they had me here too.
Q. He is your brother-in-law?
A. Yes, sir.
Q. How far do you live from him?
A. Well, now, I live about 25 miles.
Q. Last fall, up to December, where did you live?
A. I lived about five miles from him.

Q. Where were you living at the time you went to look for
35 these pants?

A. I was living close to Panther when we went to look for the pants.
Q. How far from him?
A. About four or five miles.
Q. Did you see this colored man at Le Flore's?
A. I never saw him right at Le Flore's.
Q. Where did you see him?
A. I saw him right close on the prairie.
Q. How far from his house, and how often?
A. Half a mile, I guess, from his house.
Q. What direction from his house?
A. Kind of west of his house, on the prairie.

Q. You saw him west of his house. What month was that in?
A. I don't recollect.
Q. How often did you see this man?
A. The nigger?
Q. Yes.
A. I never did see him but two or three times in my life.
Q. Did you ever see him at Le Flore's?
A. I never saw him right at Le Flore's house. No, sir; I don't think I did. If I did I don't remember it. I might have seen him at the house.
Q. You don't remember if you saw him at Le Flore's?
A. No, sir.
Q. How do you know you ever saw him at all if you did not see him at Le Flore's?
A. Well, I know I saw him.
Q. Didn't you tell before the commissioner that he was living at Le Flore's and that you saw him there?
A. No, sir.
Q. Didn't you state he was staying at Le Flore's?
A. He was staying at Le Flore's, and I saw him going from Le Flore's over to Panther with Mr. Cupp.
Q. Is that the only time you saw him?
A. No, sir; I saw him once before that out on the prairie.
Q. How long before you saw him with Cupp was it you saw
36 him out on the prairie?
A. He was out there; looked like he was hunting something, and I stopped and looked at him. He was barefooted.
Q. How close were you to him?
A. About 25 or 30 steps.
Q. That is the first time you ever saw him?
A. I think it was.
Q. Can't you be positive about that?
A. No, sir; I don't recollect.
Q. What is the reason you don't recollect; you were here as a witness in December, were you not?
A. Yes, sir.
Q. And you went with Le Flore to the bones when you found the bones there, didn't you?
A. Yes, sir.
Q. You were the man that went with Le Flore?
A. Yes, sir.
Q. Did anybody else go with you?
A. No, sir; not then.
Q. Who went with you to the bones; just you two?
A. Yes, sir.
Q. Did you talk to Kemp any?
A. No, sir.
Q. The first time you saw him?
A. No, sir.
Q. He was about half a mile west of Le Flore's?
A. Yes, sir.

Q. What was he doing?

A. He was just walking around, looking around on the grass like he was hunting something, and I stopped and watched him look a while.

Q. Did you have a gun with you?

A. No, sir.

Q. Is that the only time, now, you remember of seeing him?

A. I sa' him once after that when he came from Le Flore's over to Panther with Mr. Cupp.

Q. Where did you see him?

A. I saw him in a wagon with Mr. Cupp.

Q. Whereabouts?

A. There close to Panther.

Q. Why didn't you tell that before the commissioner?

A. I did, I think.

Q. Are you positive that is the last time you saw him?

A. I think it was.

37 Q. How many times did you meet him? I will ask you if you did not meet him—hold on on that point. What was he doing in the wagon?

A. Mr. Cupp just brought him over there, I think. I think Le Flore sent him over there for him to take him off.

Q. Now, you say you never saw him but twice?

I don't recollect of seeing him but twice; I might have seen him more than that.

Q. You may have?

A. Yes, sir; but I don't recollect.

Q. I will ask you if you have not heretofore said you saw that man at Le Flore's?

A. Right at the house?

Q. Yes, sir; right at the house.

A. I don't think I did.

Q. I will ask you if you did not meet that man often?

A. No, sir; I never did see him but two or three times.

Q. You have no recollection now of ever having seen him but twice; wasn't you right close to that fellow when you saw him the first time?

A. About as far as from here to that [indicating].

Q. You paid no particular attention to him, did you?

A. I just stood there and watched him a while.

Q. Then how far were you from him when you saw him the next time at Panther?

A. I was right at him.

Q. Did you talk with him?

A. No, sir; I never said anything to him.

Q. Did the wagon pass by you?

A. The wagon came to the shop and stopped and he got out, and Mr. Cupp told him to take that road and go on, or something to that amount; I don't remember just exactly.

Q. He told him to light out, didn't he?

A. Told him something to that amount; I don't remember just what he said to him.

Q. Which direction did he go from Panther?

A. He started on up the road——

Q. Which direction?

A. Out west.

Q. Went west of Panther?

A. Yes, sir.

38 Q. Do you know what month that was in?

A. No, sir; I don't recollect.

Q. Did you know Levy Kemp?

A. I know him when I saw him.

Q. Did you know his name?

A. No, sir; not only just what other people said.

Q. Didn't you say before the commissioner that you didn't know him, but you had met him a few times?

A. I knew him when I saw him; I was not acquainted with him.

Q. Didn't you state before the commissioner that your had met him a few times?

A. I say now I had met him a few times. I have seen him a few times; you can cal' it met if you want to.

Q. Do you call that meeting a man, when you see him off about 30 or 40 steps and you have nothing to say to him?

A. No, sir; I didn't have nothing to say to him.

Q. Now, you tell the jury you never did see him at Le Flore's?

A. Not at the house, I don't think.

Q. Did you stay around Le Flore's any in August? You say you lived four or five miles away from August up until December; did you work for Le Flore?

A. Yes, sir.

Q. When? Now, let's have it; don't keep it back.

A. In August, I believe, or September; I helped him to haul hay, I think.

Q. Why didn't you tell us that before? Was it August or September you helped him haul hay?

A. September, I believe.

Q. You helped him haul hay in September; was that colored man there then?

A. No, sir; he was not.

Q. All of September you helped him haul hay, did you?

A. I don't recollect how long I helped him.

Q. What time in September did you go over to help him haul hay?

A. I don't recollect what time it was.

39 Q. Didn't he pay you for it?

A. No, sir; he has not yet.

Q. How much does he owe you for it?

A. I don't know.

Q. You don't know?

A. I don't know just how much he owed me.

Q. How much was he to pay you a day for your work?

A. He never said, and I never asked him.

Q. He never told you how much he was paying you a day, and you never asked?

A. No, sir.

Q. How many days did you work for him?
A. I don't know that.
Q. Have you any idea?
A. I worked a week or two, or maybe two week'.
Q. What time in September did you go there, and what time in September did you leave?
A. I don't recollect.
Q. Was it the first of September or the middle of September you went there?
A. I could not say, for I don't recollect what time it was.
Q. Were you there in August? Did you work for him in August?
A. I don't recollect.
Q. Did you work for him in October?
A. Yes, sir; I helped him some, I think, in October.
Q. Was the darky there at any time you helped this man?
A. No, sir.
Q. How can you identify these pants if you were never any closer to that man than you have already stated to the jury?
A. Well, sir, there was a man lived at Le Flore's had them around and wanted to trade them to me. He said they were too long for him, and he left there and Le Flore give them to the darky, and I knew the pants.
Q. How do you know Le Flore give them to the darky? Do you know of your own knowledge that he did that, or from what somebody else said?
A. I never saw him give them to him, but I knew the pants, and he said he gave them to him.

40 Q. What size man was that that owned the pants?
A. He weighed about 150 or 160, I guess.
Q. Such a man as you? As large as you?
A. The pants were too long for him. He wasn't as tall as I am.
(Witness excused.)

41 C. B. WARD, having been duly sworn upon behalf of the Government, was placed upon the witness stand, when the following occurred:

Mr. J. K. BARNES (of counsel for defendant). We object to the introduction of this witness. We have not received any notice of this witness as a witness against the defendant.
The ASSISTANT DISTRICT ATTORNEY. Stand aside, Mr. Ward. Objection is made to you, so you will have to stand aside.
(Witness excused.)

42 HANNAH SOCKY, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, through Interpreter Morris, and testified as follows, to wit:

Question. Ask her where she lives.
Answer. Panther, San Bois County.
Q. Ask her if she knows Eli Lucas.
A. Yes, sir; she says she knows him.

Q. Did she see him along in September on the day of a ball play?

Mr. JAMES K. BARNES (of counsel for defendant). We object to the question. He asks this witness if she saw him along in September, the day of the ball play. We object to the question. That is indicating to the witness the desired answer. We think it is leading.

The COURT. First put the question when she saw him, and then if she can not recollect it you can call her attention to it if you want to.

The ASSISTANT DISTRICT ATTORNEY. Go ahead, and ask when she saw him.

Mr. JAMES K. BARNES (of counsel for defendant). Didn't you already ask that question of her, Mr. Interpreter?

The INTERPRETER. No, sir; I just asked her if she knew him.

The ASSISTANT DISTRICT ATTORNEY. Ask her.

A. She saw him in September, she says.

Q. Where did she see him?

A. She says this colored man came to her house in the night in September.

Mr. JAMES K. BARNES (of counsel for defendant). That is the colored man she saw. I thought you were asking about Lucas.

The ASSISTANT DISTRICT ATTORNEY. Eli Lucas is what I am
43 asking about.

A. In September, she says.

Q. Where did she see him?

A. She said that he had been to the ball play, and was returning back home, and he came to her house.

Q. State what she said to him, if anything, and what he said to her.

A. She said she spoke to him something about coming and eating supper, taking supper, when he came there that evening.

Q. What else was said?

A. Didn't say anything else, she says.

Q. Was he there that morning? Was Eli Lucas there along in the afternoon?

Mr. JAMES K. BARNES (of counsel for defendant). Ask her when he was there.

The ASSISTANT DISTRICT ATTORNEY. Ask her if he was there in the afternoon.

Mr. JAMES K. BARNES (of counsel for defendant). I object to that question.

The COURT. I think he can call her attention to that. That is right enough.

The INTERPRETER. She says he didn't come there until about dark.

The ASSISTANT DISTRICT ATTORNEY. Tell her to tell what else was said by Eli Lucas.

A. She said he didn't say anything; she didn't hear him say anything.

Q. Ask her if she asked Lucas anything about a shot.

Mr. JAMES K. BARNES (of counsel for defendant). I object to that question. She said he didn't say anything else.

The COURT. I think he has a right to call her attention to it.

Mr. JAMES K. BARNES (of counsel for defendant). I ask that an exception be noted.

The ASSISTANT DISTRICT ATTORNEY: Go on and ask her if she asked Eli Lucas anything about a shot, or what he shot at.

44 A. She said that Eli Lucas, after he came from the ball play, she heard a shot out that way, and she asked Eli, "What did you shoot at?" and he said, "I have not shot at anything."

Q. Tell her to state whether or not that shot was before Eli Lucas came to the house or afterwards.

A. It was before he came.

Q. How long before he came to the house?

A. About 40 minutes, she reckons. Soon afterwards, she said.

Q. What direction was the shot from her house?

A. She says it was in the direction of Lucas's house—or I mean Doug Le Flore's.

Q. Tell her to tell whether or not Eli Lucas was armed.

A. She said she didn't see any arms.

Q. Did Eli Lucas say anything else? Did she ask him any other questions?

A. She said she didn't ask him any questions, any more than ask him what he shot at.

Q. Was there any one else present?

A. Stephen McGilberry and Jamis (?) was there and hear it, she says.

Q. Ask her if she heard anything about that colored man being killed.

A. She said she did not hear anything of it until they found the bones and Jerry Fullsom told her about it; that is when she heard it.

Q. Did she hear of it before or after Eli Lucas came to her house?

A. It was a long while after Eli Lucas had been to her house when she heard of it.

Q. Ask her if she knows the place where the bones were found.

A. No, sir; she didn't go to the place, she says.

Cross-examination by Mr. JAMES K. BARNES:

Q. Ask her if she is not a Choctaw colored woman.

A. She is a half-breed; half colored and half Choctaw, she says.

45 Q. She was raised up there in the Choctaw Nation?

A. Yes, sir; she says she was raised up there.

Q. Ask her how old she is.

A. She says she thinks she is about 50 years of age.

Q. Ask her if she is acquainted with Lina Sockey.

A. Yes, sir; she says that is her daughter.

Q. Ask her if her daughter has got a husband.

A. Yes, sir; Stephen McGillbery is her husband.

Q. Ask her if she ever saw a colored man about her house there.

A. She said he came there one night and staid all night, and the next morning he taken a chunk of fire and went across the ridge—the next morning after breakfast.

Q. Ask her if he didn't come there and take a nap on the porch—if he did not lay down on the porch and take a nap.

A. She says he slept in the house. She says while her and Stephen McGillbery and Dickson Sockey were all there together that he came that night.

Q. Ask her if her daughter, Lina Sockey, was there, and Fielding James and Stephen McGillberry all there.

A. Yes, sir; that is what she says.

Q. Ask her what she was doing when the man came there.

A. She says she wasn't doing anything. It was after night, and they were all just sitting there when he came.

Q. Ask her if her daughter, Lina Sockey, wasn't down here as a witness before the commissioner.

A. Yes, sir; she says she was here before the commissioner as a witness, and the commissioner excused her.

Q. Ask her where is Lina now.

A. She is at home.

Q. Ask her who was at the house when this colored man came there.

A. This Dickson Sockey, McGillberry, and Fielding James.

Q. What were they doing when the man came there—that is, the colored man?

46 A. She says Stephen and his wife was in the bed when this man come, and this Dickson Sockey and her were sitting up talking when he came.

Q. Ask her if it was not this way: That the man came there in the night, and Fielding James and Dickson Sockey and her daughter was asleep.

A. She said her daughter and husband was in bed asleep, and the others were all up.

Q. Ask her if she knows why her daughter was excused.

A. She said that the commissioner excused her because she didn't know anything at all to tell. That is what she understood.

Q. Ask her if she was not excused because her daughter said the colored man came there at sundown and contradicted her; ask her if she didn't hear her daughter swear that.

A. She says she didn't know what she swore. She didn't hear her testimony.

Q. She was out of the room, then?

A. Yes, sir.

Q. Ask her if she knows what month this was in that the colored man came there and staid all night.

A. She says she recollects it was in the month of September, but she does not know the date.

Q. Ask her if she has not heretofore been asked a question in regard to that, and if she didn't say she didn't know what month it was in, but she thought it was September. Ask her if she did not tell it that way before.

A. Yes, sir; she says she told before that she did not know just exactly what month it was, but she thought it was in the month of September.

Q. Ask her where did this man sleep that night.

A. He lied in the house in the room, she says.

Q. Where?

A. Just lied on the floor of the house.

Q. Ask her did that man eat breakfast there the next morning.

A. Yes, sir; she said he eat breakfast there.

47 Q. Ask her if Stephen McGillberry and Fielding James went to the ball play the day she saw Lucas at the house.

A. Yes, sir; she says they went to the ball play, and they came in a different direction, and they met there. She said they went to the ball play, and they came in a different direction—that is, Eli did, though Eli met there at her house.

Q. Ask her what time did Stephen McGilberry and Fielding James get home that evening?

A. She said it was late in the evening; she does not know what time it was; just when they came home there.

Q. Ask her if she can not give us some idea.

A. She says she don't know; she supposes it was about four or five o'clock; she don't know the time.

Q. She thinks four or five o'clock. Ask her if the sun was not two or three hours high.

A. Yes, sir; she says the sun was up a good piece yet when they came.

Q. About an hour and a half or two hours high when McGilberry and Fielding James came?

A. She says it was in the evening. She does not know exactly what time; tolerable late in the evening.

Q. Tell her to indicate how high the sun was when they came?

A. She says the sun was just about in that direction [pointing].

Q. How much high would that make it? About two hours? Tell her to point again. Take this pencil and point. [Witness points.] Now ask her about how high she thinks the sun was.

A. She says she don't know, but she thinks it was a little after 4 o'clock; something after 4 o'clock.

Q. A little after 4; she don't know exactly?

A. That is what she thinks; she does not know.

Q. How long had they been there before Lucas come?

A. She says she supposes it was about half an hour after they come before Lucas come.

48 Q. That would be about half after 4 when Lucas came. Ask her how many shots did she hear.

A. She said she only heard one shot.

Q. Ask her how was Lucas travelling, horseback or foot.

A. Horseback, she says.

Q. What kind of a horse was he riding?

A. She said he was riding a tolerable good-size bay horse.

Q. Small horse or large horse?

A. She says a tolerable good-size horse.

Q. What kind of a horse did Fielding James ride?

A. He was riding a white horse, she says.

Q. What kind of a horse did McGilberry ride?

A. He was riding a bay, bald-face horse—blazed face.

Q. She says that McGilberry and James came there just a little after 4, and just a little afterwards Eli came?

A. Yes, sir; about half an hour, she says.

Q. Now ask her where was Fielding James and McGillberry when she heard this shot.

A. She said Felding James and McGilberry and her were all sitting on the porch; they were sitting on the porch when they heard the gun fire.

Q. Ask her if that was the only shot she heard that day.

A. That was all that she heard that day.

Q. When Eli come he didn't have any pistol or any gun?

A. She said she didn't see any arms about him when he came.

Q. Didn't McGilberry and James have a pistol or gun that day?

A. No, sir; didn't have any guns, she says.

Q. Was Eli in his shirt sleeves when he came there?

A. She does not remember as to whether he had on a coat or not, she says; whether he had on a coat or was in his shirt sleeves.

Q. Does she remember whether the other men had on coats or were
49 in their shirt sleeves?

A. She does not remember as to whether they had on coats or not; she says, though, she supposes probably they were in their shirt sleeves; she didn't notice as to whether they were wearing coats or not.

Q. How long did Eli stay there; did he stay there that night?

A. She said he went to Dickson Billy's after he had eat his supper.

Q. Ask her if she knows what he went there for.

A. She says she don't know what he went there for. He just said he was going after he eat his supper, and she knew he had gone, but she don't know what his business was for going there.

Q. Ask her where did they have that ball play.

A. At Iron Bridge, she says.

Q. Ask her if Iron Bridge is not north of where she lives.

A. She says Iron Bridge is north of her place.

Q. Then the ball play was north of her place?

A. Yes, sir.

Q. Ask her if Panther is not south of her place.

A. She says that Panther is west from her place.

Q. How far is Panther from her place?

A. She says she thinks it is about three miles.

Q. Ask her if that is not where Jerry Fullsom lives.

A. Yes, sir; that is where he lives.

Q. Ask her if Eli Lucas didn't come from the direction of the ball play.

A. Yes, sir; she said he come from the direction of the ball play when he came there.

Q. Ask her if Stephen McGilberry and Stephen James did not go to the ball play.

A. Yes, sir; she said they went to the ball play.

Q. Ask her when did they go to the ball play.

A. She said they went to the ball play near 12 o'clock; they and Eli Lucas all went together; Eli Lucas and Jim Brandy and all of them went together.

50 Q. Who else?

A. Stephen McGilberry and Brandy and Lucas went together at the ball game something near 12 o'clock.

Q. Ask her how far was the ball play from her house.

A. She says she had never been over that way where the ball play was, and she don't know just how far it was as to where the ball ground was.

Q. Ask her if Jerry Fullsom did not live southwest of her place about three miles.

A. She says that he lives west from her place.

Q. Ask her if it is not southwest.

A. She says she always called it west. I asked her the question, and she says she always called it west.

Q. Ask her if she was a witness before the commissioner, and if she did not state when she heard that shot fired that this man Fielding James and Stephen McGilberry were in the house.

A. She says when she told it before the commissioner she told it as they were sitting outdoors on the porch.

Q. And ask her if she did not say that after these two men came in the house that she heard the shot fired, and that Eli came in about the same time, and that he never told her anything. Ask her if that was not the statement she made.

A. She says she never did tell it any othe' way except to say she was outdoors there, and she heard the shot fire. She said if it was told any different than that it must have been a mistake of the interpreter, she says.

Q. Ask her if she did not make this statement before the commissioner—didn't she tell the commissioner that Fielding James and Stephen McGilberry came over to her house from Panther, and Lucas came over the hill the other way——

A. Yes, sir; she says she told——

Q. "And just after Fielding and James (it is Fielding and James here, but I suppose that is a mistake, but I will read it just like it is) came in the house she heard a shot fire, and he came in (meaning Eli) about the same time, and she says he never told her anything."

51 Ask her if that wasn't the way she stated it.

A. She says she stated that it was a little while after they come before Lucas come.

Q. She says now they were sitting out in the yard.

A. On the porch, she says.

Q. Ask her how high was the sun when she heard this shot fire. Tell her to show how high the sun was.

A. She said it was tolerable late; the sun was down about amongst the tops of the trees.

Q. Ask her if before she did not state she heard this shot about dark.

A. She says, no, sir; she did not tell that it was about dark. She says that question was asked to her, but she did not tell it that way.

Q. Ask her if it was not common thing to hear shots around there, people hunting, etc.

A. She says, yes, sir; that it is common to hear shots fired around, the people shoot around, and that is why she asked Lucas what he shot at when he came.

Q. She asked him that because it was so common.

A. Yes, sir.

Q. Ask her if it is not a pretty common thing for people to go to ball plays and shoot, especially when coming away from the ball plays.

A. She says they probably do shoot a great deal around ball plays; she is never around to ball plays and she doesn't know but they probably do.

Q. Ask her if she has not seen them coming from ball plays shooting.

A. She never paid any attention she says.

Q. Ask her if she heard any other shots that day.

A. That was all the shot she heard that day that she remembers of.

Q. Ask her if it is not true that she did not think anything was wrong, and did not pay any particular attention to it, and it is true she only heard just the one shot.

A. She said yes, that was all the shot she heard, and she never paid a great deal of attention to it, either. She said she didn't suppose
52 it was anything had happened, anything more than just somebody was shooting at game or something. She said that this man was over across the ridge there——

Q. She does not know anything about that.

The ASSISTANT DISTRICT ATTORNEY. What is that?

The INTERPRETER. She said she had heard about this man being——

Mr. JAMES K. BARNES (of counsel for defendant). I object to that; she can't tell us what she heard. Ask her if she was over there, if she ever saw the man after he left her house anywhere—that is, the colored man. Tell her not to tell me what she heard, either.

A. No, sir; she says she had never seen him.

Q. She never saw him after he went away from there?

A. No, sir.

Q. Ask her where is Denison Sockey—if he is not her son.

A. Dickson Sockey, she says it is. That is not her son, though.

Q. Where is he?

A. She says he is at San Bois, she reckons.

Q. Ask her if he is not at her home. She says he was there that evening.

A. She said that he came there on a visit that evening, and he was there, and he left the next morning.

Q. Where is he now? How far is he from her place?

A. She says she thinks it is a little further than ten miles.

Q. Ask her if Fielding James or Dickson Sockey have ever been brought here as witnesses.

A. No, sir; they have not been brought here.

Q. And Lina was brought here and turned off by the Government?

A. Yes, sir; that is what she says.

Q. Only she and Stephen are here now?

A. Yes, sir; her and Stephen is the only two that is here.

Q. Ask her if it is not true that Stephen was not before the commissioner?

A. No, sir; she don't think he was here before the commissioner.

Q. Ask her if this is not Stephen's first trip down here in this case.

53 A. She said that he was here before, but they were excused when the case was continued.

Q. They were not marked present on the indictment. I never saw anything of him here before.

The ASSISTANT DISTRICT ATTORNEY. I do not think it is necessary to go into that; it does not matter whether you ever saw them or not.

The COURT. No.

Mr. JAMES K. BARNES (of counsel for defendant). Ask her if it is not a fact that he never was here before as a witness in this case until this term of court.

The COURT. I do not think that is a material inquiry.

The INTERPRETER. She says this is the second time that he has been here on this case; that he was here before.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Tell her to tell us in what direction the colored man went off with the chunk of fire.

A. She said that he went towards Duke Le Flores.

Q. Was that in the direction——

Mr. JAMES K. BARNES (of counsel for defendant). I object to that.

The ASSISTANT DISTRICT ATTORNEY. Was that in the direction that Eli Lucas came from, or the direction of the shot she heard that night?

A. She says, yes, sir; that she heard the fire in that direction that he left when he left her house.

Q. Now, what was he going to do with the fire, the chunk of fire?

A. She says she don't know; she says she supposes he was going to make a fire to warm by.

Q. How long was that, that he went off with that chunk of
54 fire, before Eli Lucas came there after the ball play?

A. She says she does not know just how long it was, but it was a good while afterwards.

Q. What was a good while afterwards?

A. After he had left with that chunk of fire before Eli Lucas was coming in the direction.

Q. Does she know how many days?

A. She says she does not know how many days; that she wasn't at home all the while, anyway; she was visiting around at other places, and she was not at home all that time. She just heard of him being camped over there, she said——

Mr. JAMES K. BARNES (of counsel for defendant). I object to that.

The ASSISTANT DISTRICT ATTORNEY. Well, all right.

Recross-examination by JAMES K. BARNES, Esq.:

Q. Ask her what she was doing away from home.

A. She said she was not at home all the time; she said she would just go a visiting to some of her neighbors.

Q. Ask her if it was not about a month after the man went off with that chunk of fire that she heard that shot.

A. She says she does not think it was quite a month.

Q. Ask her if it was not about two or three weeks.

A. She said she could not tell just as to what time, but she says she supposes it might have been two or three weeks.

(Witness excused.)

55 STEPHEN MCGILBERRY, having been duly sworn upon behalf of the Government, was examined by J. B. McDonough, esq., the assistant district attorney, through Interpreter Morris, and testified as follows, to wit:

Question. What is your name?

Answer. Stephen McGilberry.

Q. Do you know Eli Lucas?

A. Yes, sir; he says he knows him.

Mr. JAMES K. BARNES (of counsel for defendant). I would like to ask one question. Ask him if he can't talk good English.

The COURT. How old are you?

(Witness answers in Indian.)

The INTERPRETER. He says he was 27 years old in April.

The COURT. Do you know whether he can talk English or not, Mr. Morris?

The INTERPRETER. I have heard him speak some few words.

The ASSISTANT DISTRICT ATTORNEY. I had to have an interpreter to consult with him.

The COURT. Go ahead.

The ASSISTANT DISTRICT ATTORNEY. Tell him to tell us what he knows about the time Eli Lucas being at a ball game with him along in September sometime—a ball play.

A. He said he was fixing to go to the ball play, and Jim Brandy and Eli Lucas came to his house; came up on the way, and they were going to play at the Iron Bridge there, and they came up, and he went on with them, and they went on to the ball play together.

Q. Did he leave the ball play with Eli Lucas?

Mr. JAMES K. BARNES (of counsel for defendant). Just ask him who left with him.

The ASSISTANT DISTRICT ATTORNEY. Go ahead.

56 Mr. JAMES K. BARNES (of counsel for defendant). I object to the question in that form. He asked him if he left with the defendant, Lucas.

The ASSISTANT DISTRICT ATTORNEY. If it was a material question I would not care.

Mr. JAMES K. BARNES (of counsel for defendant). It may be material, and I object to it in that form.

The COURT. Ask him who he left with first.

The INTERPRETER. He said there were several of them together; Silas Ward and lots of them were together when they left.

The ASSISTANT DISTRICT ATTORNEY. Was Eli Lucas along?

A. Yes, sir; he says Eli Lucas was along. He said after they left the ball game a piece, and got out on the road a piece, they separated, Eli Lucas and Silas Ward and they went a different road, and they went a different road home.

Q. Did he see Eli Lucas any more that day?

A. Yes, sir; he said he seen him when he left there, when they separated, and after they had got home; not a great while after he had got home Eli came.

Q. Did anyone come with Eli?

A. He was by himself.

Q. Did he say anything to Eli?

A. He said when he came he talked with him, but then they were just talking in regard to the game they had.

Q. Did he say anything else to him? Did he ask him any questions when he came up?

A. He didn't ask him any questions, he says.

Q. Ask him if there was anything said about the shooting?

Mr. JAMES K. BARNES (of counsel for defendant). If your honor please, we object to the question.

The COURT. Go ahead.

Mr. JAMES K. BARNES (of counsel for defendant). I ask to have an objection noted.

The INTERPRETER. He said he heard a shot just before Eli came.

57 The ASSISTANT DISTRICT ATTORNEY. What direction was the shot?

A. It was northwest of his place, he says.

Q. From what direction did Eli come to the house?

A. He said he came from a north direction to his house.

Q. Did anybody ask Eli any questions about the shooting; about the shot?

A. He said Hannah Sockey asked him what he shot at, and he said he didn't shoot at anything.

Q. Did anybody else ask him about the shot?

A. No one else didn't ask him.

Q. Ask him if Eli Lucas ever told him, the witness, anything about the killing of the colored man.

A. He said he told him that he killed a man some time after that. They were just talking and laughing; he just thought he was joking, and he never said anything more to him.

Q. Did he say what man it was that he killed?

A. He just told him he killed a negro, he said.

Q. Did he use any other word in describing it?

A. He just told him that he killed a black man; he says he didn't say who he was.

Q. Did he say what black man?

A. No, sir; he didn't say what black man.

Q. Where was it that he told him that he killed him?

A. He did not tell him where at, or anything about it.

Q. Did he tell him where the body was?

A. No, sir; he didn't tell him anything about where the body was, or anything about it.

Cross-examination by Mr. JAMES K. BARNES:

Q. Ask him if Eli was drunk when he told him that.

A. No, sir; he said he was not drunk.

Q. Ask him where was Eli when he told him that.

58 A. At the Iron Bridge, at the little store.

Q. Whose store?

A. He said he was just around there at the little town, at the Iron Bridge; not no certain store.

Q. Tell him he must tell us just where it was; that he must not do us that way; that he must tell us just exactly where it was; that we want to know.

A. It was there at the little town of Iron Bridge, el'se to a little store, he says.

Q. Ask him if he did not say awhile ago at a store—not close to a store, but at a little store there.

The ASSISTANT DISTRICT ATTORNEY. "At" means near to, does it not?

Mr. JAMES K. BARNES (of counsel for defendant). We will get to calling you professor pretty soon.

The INTERPRETER. He said a little store; he just meant there in town.

Q. Ask him if there are not several stores there.

A. He said there are two stores there.

Q. Which one of the stores was it at, and whose store was it?

A. Williams's store.

Q. Ask him if it was right in the store.

A. No, sir; they were not in the store; they were outside.

Q. Ask him how far he was from the store? Ask him if it was not right in the store door.

A. No, sir; they were not in the store door; they were off a little piece from the store, he says.

Q. Ask him*se* to tell us how far it was, and what direction he was from the store.

A. He says he did not notice how far it was from the store.

Q. Ask him what time of day it was.

A. He says he never paid any attention as to what time of day it was.

59 Q. Ask him if it was before or after dinner.

A. He says he does not know whether it was before or after noon.

Q. Ask him if it wasn't a little before daylight that he told him that.

A. No, sir; he said it was in the daytime, but he did not notice what time it was of day.

Q. What was he doing over there?

A. He was down there, he said, at the store to get some goods, and he didn't have much talk with him; he was in a hurry, and he got what he was after.

Q. He was in a hurry?

A. Yes, sir.

Q. Ask him if Eli did not rush right up to him and laugh and say he had killed a nigger.

A. Yes, sir; he said Eli just walked up to him and told him he had killed a nigger.

Q. Ask him if he did not say it was a black man instead of a nigger.

A. Yes, sir; he said he said it was a black man.

Q. Ask him if he did not say a colored man instead of a black man.

A. He just said a black man, he says.

Q. And they were laughing and talking about it. Ask him if Eli was not joking about it.

A. He said he don't know; he said he was just talking in a joking way, and he said he killed a black man; and he just spoke to him and said, "If you killed him you would not tell it," and they just laughed it off.

Q. So he didn't tell him anything at all, that he just laughed it off; there wasn't anything left of it. Ask him if that is not the way of it.

A. Yes, sir; he just said that.

Q. He laughed and Eli laughed, didn't he?

A. Yes, sir; he said they both laughed. He said he didn't believe Eli; he just thought he was joking, and he just laughed, and he went on away.

Q. He took it all as a joke, then?

A. Yes, sir; he said he took it all as a joke, and he just thought he was running on, joking.

Q. Ask him if Eli don't joke a good deal.

60 A. Yes, sir; he says Eli runs on and *jokes* a good deal.

Q. Ask him if Eli isn't generally pretty full of fun and always joking and blowing about things.

A. Yes, sir; he said Eli always seemed to be very funny, talking and laughing and running on in his foolishness.

Q. Ask him if Eli does not *talk* a great deal of foolish talk.

A. He says that Eli runs on and jokes a great deal.

Q. Ask him if he ever told anybody about this before he came down here.

A. He said no, sir; he hadn't said anything about it; he did not tell anybody anything about it until just lately he was talking about it, and he just spoke of it, he said he didn't tell anything about it.

Q. Who did he speak of it to?

A. He said after Eli was arrested he said that he heard Jerry Fullsom and them talking about it, and that is all he heard of it, just what they said.

Q. Jerry Fullsom and who else, ask him.

A. He said he heard several of them talking.

Q. Tell him to tell us who they were.

A. He heard Jerry Fullsom; he said he heard Jerry Fullsom, and he told him about it, and then afterwards Simon Johnson told him about it, and that is all he heard about it.

Q. That is one of our witnesses that is sick. Ask him who was the first one that talked about it, and ask him how long after that was it that he talked to this party; that is, after Eli told him he had killed the colored man.

A. How long after Eli——

Q. Told him that he killed the black man was it that he talked to anybody, and who was the first one that he talked to, and where was it that he talked to him?

A. He said it was after Eli was arrested; he does not know just

61 how long it was, but it was after Eli was arrested. He said he heard them talking about him being arrested.

Q. Ask him if that was after the bones were found.

A. He said yes, it was after the bones were found.

Q. Ask him how long it was after the bones were found.

A. He says he does not know how long it was after the bones were found, he says.

Q. Ask him if it was not two or three months after the bones were found.

A. He said it was not a great while, he don't think, after the bones were found before he heard them speaking of it. He does not know just how long after the bones were found until he heard them talking about it.

Q. Ask him if he did not marry Lina Sockey, or if he didn't live with her.

A. No, sir; he didn't marry Lina Sockey, he says.

Q. He is not married to Lina?

A. That is what he says.

Q. Ask him if he is not sleeping with her?

A. He said he used to live with her, but they separated some time ago.

Q. How long ago?

A. Four or five months, he says.

Q. Ask him if he was not living with Lina Sockey at the time they found the bones.

A. He says he does not remember.

Q. Ask him if he is living at Hannah Sockey's now.

A. No, sir; he does not live there.

Q. When did he leave there?

A. He thinks it was in January, he says.

Q. Left there in January?

A. Yes, sir.

Q. Ask him if Lina Sockey, while he was living with Lina, if Lina and Hannah Sockey were not down here as witnesses against this man, and if he does not know that, too.

A. Yes, sir; he said they came down here as witnesses. He says he does not know exactly what month it was.

Q. He was living with Lina at that time, wasn't he?

A. Yes, sir.

Q. And lived with her for a month after that, did he not?

A. No, sir; he says he don't think he staid there a month afterwards.

62 Q. Ask him if he told Lina and Hannah about this thing before they came down here as witnesses, or if he ever told them about it.

A. No, sir; he has never told them anything about it.

Q. No time at all?

A. No, sir; he has not told them any time at all about it.

Q. Ask him who was the first man he told, and where he told him.

A. He said he didn't tell anybody anything at all about it.

Q. He never told anybody at all until he told it on the witness stand here?

A. Yes, sir; that is the first time he ever said anything about it here on the witness stand, he says.

Q. Ask him why did he tell a while ago that he told Jerry Fullsom, and I pressed him to tell who the other parties was, and he could not do it; why did he tell that.

The ASSISTANT DISTRICT ATTORNEY. He told you that he heard Jerry Fullsom talking.

The INTERPRETER. That is what he said. He didn't say that he told Jerry.

Mr. JAMES K. BARNES (of counsel for defendant). Ask him if he did not tell Jerry Fullsom about it.

A. Yes, sir; he said he did tell Jerry Fullsom. He said he just recollected of telling Jerry Fullsom that.

Q. He recollects it now. Ask him if Jerry did not try to get him to tell what he knew about it. Didn't he try to get him to tell?

A. No, sir; Jerry didn't ask him any questions about it, he says.

Q. How come him to tell Jerry?

A. He said they had Eli arrested, and they were talking about it, and he just told Jerry what he heard Eli say, but he just told him he thought Eli was joking.

Q. Ask him what he told me a while ago, that he never had told anybody until he told it on this witness stand. Ask him what made him tell that.

63 A. He said he had forgotten what he had said to Jerry Fullsom.

Q. Ask him if he did not tell Mack King.

A. No, sir.

Q. And John Ellis?

A. No, sir.

Q. John Jones?

A. No, sir; he said he didn't tell him.

Q. Ask him if he heard them talking about it.

A. He said he heard John Jones and them talking about Eli being arrested.

Q. Didn't John Jones, John Ellis, Jerry Fullsom, and Mack King tell him what they were going to swear to?

A. No, sir; they didn't tell him that they were going to swear.

Q. Ask him at whose house it was—at whose house he heard Jerry speak of it.

A. He heard Jerry speak of it, he said, there in front of his house.

Q. At Panther?

A. Yes, sir.

Q. Where did he hear John Jones speak of it?

A. He said he did not hear John Jones speak of it anywhere.

Q. Tell him he told us a while ago he did.

A. He said he heard him talking of Eli being arrested.

Q. Ask him what Jerry said to him there at his house about it.

A. He said Jerry just only told him about Eli being arrested and that is what he told him.

Q. Did he tell him anything else?

A. He said that is all he told him about Eli being arrested.

Q. Ask him if Jerry didn't tell him that he was going to swear that Eli told him that he was going to kill the man and that he wanted to make a witness out of him, and if that is not the way he got to be a witness.

A. No, sir; he said he didn't tell him that.

Q. Ask him who was present when he was talking to Jerry.

A. He said there was a white man there, but they were talking in Choctaw and he don't suppose he understood what they were talking about.

Q. Ask him, when he talked to Mack King and John Ellis, what

64 place they were at—what place they were at when he was talking to them about this killing.

A. He said Mack King and John Ellis hadn't spoke to him anything about it at all.

Q. Ask him if he did not tell us a while ago that he talked to all three of them—John Jones, Mack King, and John Ellis—about this.

A. He said he didn't say that.

Q. Now, ask him where did they have the ball play that day.

A. He said it was a place close to Iron Bridge; that the Iron Bridge parties and Panther parties played against each other. It is a place that has a queer kind of a name; he thinks it was Black Springs.

Q. Ask him if they did not have the ball play on Devils Prairie.

A. Yes, sir; he said it was right in that settlement of that place.

Q. Ask him how many ball plays were there at that place.

A. He said they played the second time.

Q. Ask him if that was the second ball play.

A. He said he was at both ball games.

Q. Ask him if that was the second ball play that Eli Lucas—when Eli came to his house there and he went with him—if that was the second ball play on the prairie.

A. He says he thinks it was the first ball play.

Q. Ask him when was that.

A. It was in September, he says.

Q. What time in September?

A. He says he does not know.

Q. Ask him if he knows what month this is.

A. He says it is June.

Q. Ask him what is the reason he can't tell us what time in September this was.

A. He said he never took any thoughts of the date.

Q. Ask him if that wasn't the first of September.

A. He said it was several days, he reckons, in September, but he don't know.

Q. Ask him if they didn't have the second ball play there the last of September.

65 A. Yes, sir; he said the second ball play was the last of September.

Q. Ask him which one of the ball plays was it that Eli Lucas came to his house after he had gotten home, and they had just heard that shot; was it the first or last ball play in September?

A. He said it was the first ball play.

Q. Now, ask him who went to that ball play with Eli Lucas; just to name every man that went with him.

A. He said him and Jim Brandy was at the house when he came; he had been out hunting his horse; when he came they got ready, and them three went together.

Q. Ask him if Fielding James didn't go with him?

A. He said Fielding James didn't go along with them, for he hadn't found his hors' yet, but he came on afterwards, after they had got there.

Q. He says Jim Brandy was along with him.

A. Yes, sir.

Q. Ask him if Silas Ward was along—didn't go with him.

A. Silas Ward was on ahead of them; he had got there before they did.

Q. Ask him if Eli rode behind him.

A. He said him and Eli did ride behind to one ball play, but not that one. It was the one at San Bois.

Q. Ask him what kind of a horse Eli was riding.

A. He said it was a sorrel horse.

Q. What kind of a horse was he riding? Ask him what kind of a horse Eli was riding that day when he heard that shot, not when he was riding behind him, but the other time.

A. He said that Eli was riding a bay horse.

Q. What kind of a horse was he riding?

A. He was riding a sorrel.

Q. Ask him who came back from the ball play together.

A. He said there was a great many came along together until they came about a mile from the ball game, and they separated there down at the road, and Silas Ward, and Eli, and Simon Dwight went a different road. This witness and four or five others went a different direction.

66 Q. Who went with the witness the other road?

A. Jim Brandy, Johnnie Jones, Cornelius Brandy, and Isaac King. These are the parties he went with. He said after they got to Bumm's he went on home himself, after he quit the gang he was with; after they got to Bumm's house they went on to his house then.

Q. Ask him if Fielding James didn't go home with him.

A. He said Fielding James was along but he turned a different direction.

Q. Then Fileding James didn't go home with him?

A. He said Fielding James got to his house before he did; went a different direction and got to his house before he did.

Q. Fielding got home before he did. Then he didn't go home with him?

A. No, sir.

Q. Ask him how far was that ball play from his house.

A. He says he thinks it was about two and a half miles.

Q. Ask him if he was at the second ball play, up there near the Iron Bridge on Devils Prairie.

A. Yes, sir; he was there.

Q. Ask him who went there with him.

A. He says he went there by himself, he thinks, on that second game.

Q. Did Fielding James go?

A. He said Fielding James came to the ball play after he did.

Q. They were both staying at the same house, were they not?

A. Yes, sir; they both staid at the same place.

Q. Ask him if Eli ate supper at his house the night he came there, after he heard that shot.

A. Yes, sir; he eat supper there.

Whereupon, the noon hour having arrived, court took a recess until 1.30 p. m.

Afternoon session, 2.00 o'clock; continuation of the cross-examination of Stephen McGillbery by James K. Barnes, esq.

Q. I believe he said he went to the second ball play by himself.

67 Ask him if anybody came away with him.

A. No, sir; he didn't go by himself. He says there were others with him; that there was other parties came back with him.

Q. Who were they?

A. Anderson Coaley and Isaac Hancock were the two that were with him when he came back from the second ball play.

Q. Ask him if anyone went with him to it.

A. No, sir; there was no one went with him.

Q. Ask him where was the second ball play.

A. He said they played at the same place where they played the first game.

Q. Now, ask him if he went to any other ball play.

A. Yes, sir; he went to other ball plays besides that.

Q. Ask him if he went to a ball play on McKinney Prairie, a little this side of San Bois town.

A. Yes, sir.

Q. Ask him if he went to the first ball play there.

A. Yes, sir; he said he was at the first ball play there.

Q. Ask him who went with him.

A. He said that there was a good many of them went together. He said that Eli went along with him, rid behind him; that he hadn't got his horse, and they rode double and went.

Q. Ask him where he got with Eli.

A. At Jerry Fullsom's.

Q. He got with Eli at Jerry Fullsom's?

A. Yes, sir; he said there was a big crowd of people there at Fullsom's, and they all went together, a great host of them.

Q. Ask him if Eli didn't come back with him, and ride behind him back.

A. Yes, sir; he said Eli rode behind him back.

Q. Ask him if he didn't leave Eli at Jerry Fullsom's.

A. Yes, sir; he said Eli got off at Fullsom's.

Q. Ask him if he was at the second ball play this side of San Bois.

A. Yes, sir; he said he was at the second ball play.

Q. Ask him who went there with him.

A. He said he was with Johnnie Jones, and he said Eli had a
68 wagon that trip; that he went in a wagon.

Q. Ask him if he knows whose wagon he had.

A. Yes, sir; he said that Eli had his wagon.

Q. Had Stephen's wagon?

A. Yes, sir.

Q. Ask him where did he get with Eli that day.

A. He said that Eli came there to borrow his wagon that day, and he left Eli there fixing to take the wagon, and he went on to the ball game, and Eli came on afterwards in the wagon.

Q. Ask him who was in the wagon with Eli.

A. He said Lina Socky and Johnnie Jones and his wife and Eli and his wife.

Q. Ask him if his wife was not along. Lina Sockey is his wife, isn't she?

A. Yes, sir; that is the one that was along.

Q. Ask him if Eli brought the wagon back to his house, or if he got out at Jerry Fullsom's.

A. Yes, sir; he said Eli brought the wagon back to his house.

Q. Ask him where did Eli come after that.

A. He said he thinks he went over to Jim Brandy's.

Q. Ask him when were these two last ball plays this side of San Bois town—the month.

A. It was in October, he says.

Q. Ask him if the other two ball plays were not in September, near the Iron Bridge.

A. Yes, sir.

Q. Now, ask him if he wasn't at a ball play just about half a mile this side of San Bois town in November.

A. Yes, sir; he was.

Q. Ask him if he did not see Eli there.

A. He said Eli was there; yes, sir.

Q. Ask him how did Eli go there.

A. He went in a wagon, he says.

Q. Ask him whose wagon was it.

A. He says he does not remember whose wagon it was.

Q. Ask him if it was not Dickson Billie's wagon.

A. He says he does not know exactly, but he thinks it was Dickson Billie's.

69 Q. Ask him if Betsy Nail and Johnnie Jones and wife were not in the wagon.

A. Yes, sir; they were in the wagon.

Q. And Jamison Franklin?

A. Yes, sir.

Q. Ask him when he first came down here as a witness.

A. He said he was down here in March, he said he believed it was, and he came down here, and he said they had continued the case, and he went back the same day he came.

Q. They had continued the case?

A. Yes, sir.

Q. They had continued the case when he got here?

A. Yes, sir.

Q. Now, ask him if that wasn't the first time he came here as a witness.

A. Yes, sir; that was the first time.

Q. Now, ask him if he was ever down here before.

A. Yes, sir; he was here before as a prisoner, he says.

Q. Ask him what was he charged with.

A. He said he was charged with larceny—stealing a horse.

Q. Ask him if he was not here last year, charged with larceny.

A. He said he was down here as a witness last June.

Q. Ask him how many times he has been arrested.

A. He says he thinks he has been arrested about three times.

Q. Ask him what he was arrested for.

A. He said he was charged with introducing whiskey.

Q. Ask him how many times he was charged with introducing whiskey.

A. He was charged just once with introducing whiskey.

Q. Ask him what they done with him.

A. He said he plead guilty to the charge.

Q. How much punishment did he get?

A. He said he was sentenced 20 days.

Q. Now, the next time he was arrested, what was he arrested for?

A. He said he was arrested for introducing whiskey.

70 Q. Ask him what did they do with him that time.

A. He says he was acquitted on that charge.

Q. Now, the third time he was arrested for larceny?

A. Yes, sir.

Q. Ask him what did they do with him on that.

A. He was acquitted on that charge, he says.

Q. Ask him if he has not been arrested for larceny twice.

A. He says no, sir.

Q. Ask him if he has not been brought here as a prisoner outside of these times he has told.

A. He says that is all the times he has been arrested.

Q. Ask him how many times he has been arrested up there by the Choctaws.

A. He has never been arrested up there in his country, he says.

(Witness excused.)

71 MACK KING, having been duly sworn upon behalf of the Government, was examined by J. B. McDonough, esq., the assistant district attorney, in chief, through Interpreter Morris, and testified as follows, to wit:

Question. Ask him his name.

Answer. Mack King.

Q. Does he know Eli Lucas?

A. Yes, sir; he says he knows him.

Q. Did you know a colored man that lived in the neighborhood about John Lefore's by the name of Levy Kemp?

A. He said he seen a colored man out there, but he didn't know his name, he says; he didn't know him—didn't know what his name was.

Q. Did Eli Lucas ever tell him anything about that man—what became of that colored man?

A. He said Eli told him that he killed him.

Q. Where did he say he killed him?

A. He said he told him that he killed him close to Stephen McGillberry's, across the ridge.

Q. Did the witness, Mack King, then go with anybody to look where he said,he killed him?

A. He said that he didn't go just then; he just didn't believe what Eli said—he was just joking about that; he never paid any attention to it, and it was some time afterwards before he ever went over there.

Q. Well, did he go?

A. He said yes, sir; they went there; there was several of them went and they asked him to go along, and he went over there.

Q. Did they find the bones of anybody?

A. He said yes, sir; they went to where he said that he killed the man and they found the bones.

Q. How did he say he killed him—how did Eli Lucas tell him he killed him?

A. He said he shot him.

Q. Did he say where he shot him—whereabouts in the body?

72 A. He didn't tell him just where he shot him; only he said he killed him. He didn't tell him, except he shot him.

Q. Tell him to tell all that Eli Lucas said to him about shooting at the colored man.

A. He said him and Cornelius Brandy were there at Jerry Fullsom's, and Eli Lucase came there and told him that he had killed that crazy nigger that was around there.

Q. He told him that he had killed that "crazy nigger" that was around there?

A. Yes, sir.

Q. Now, what else did he say?

A. He said that was all that he said.

Q. Did he make any statement to him about what part of the body he shot him—about how he shot him?

A. He didn't make any statement as to where he shot him; he just said he killed him.

Q. This is Mack King, is it not?

A. Yes, sir.

Q. (Direct to the witness.) You understand me, don't you, King? The question is whether or not he told you in what part of the body he shot him; whereabouts in the body—whether in the head, or legs, or back, or where? (The witness does not answer and the interpreter puts the question to him in the Indian language.)

A. He says he didn't tell him what place he shot him; he just said he killed him. He did not tell him what part of his body.

Q. How many times did Eli Lucas talk to him?

A. He said he just was only there for a few minutes, and said those words to him as to killing him.

Q. Tell him to state whether or not Lucas said anything about the "crazy nigger" falling over a limb.

Mr. JAMES K. BARNES (of counsel for defendant). I object to that.

The ASSISTANT DISTRICT ATTORNEY. I am suggesting it pur-

73 posely because he has stated what he recollects, and I think I have a right to call his attention now to the specific thing.

Mr. JAMES K. BARNES (of counsel for defendant). Well, I will have to have an objection noted to that.

The COURT. Yes.

The INTERPRETER. No, sir; he did not state anything to him as to how he fell.

The ASSISTANT DISTRICT ATTORNEY. Tell him to state whether or not Eli Lucas did not tell him that he shot him in the breast after he fell down.

Mr. JAMES K. BARNES (of counsel for defendant). I want to object to that, and have an objection noted.

The COURT. Yes.

The ASSISTANT DISTRICT ATTORNEY. Tell him to go ahead.

The INTERPRETER. No, sir; he says he didn't tell him.

Q. Was he along at the time they found the body?

A. Yes, sir; he was along.

Q. Did he see any hair of the head?

A. He said there was a few hairs there.

Q. What kind of hair was it?

A. He said it was kinky hair.

Q. What did he do with it?

A. He said it was a very small bunch there, and they put it in the skull.

Q. Ask him to look at this hair I now hand him.

A. He said that looks like to be the same hair that was there.

The COURT. Is it kinky?

The ASSISTANT DISTRICT ATTORNEY. Yes, sir.

The COURT. It is colored man's hair, is it?

The INTERPRETER. Yes, sir.

(Whereupon the assistant district attorney introduced hair referred to by the witness in evidence, and the same was examined by the jury.)

74 The ASSISTANT DISTRICT ATTORNEY. Tell him to say whether or not Eli Lucas told him how many times he shot the man.

A. He said that he said he shot him yesterday, and he killed him to-day—that was the next day—near 12 o'clock.

Q. Now, on the second day, did he say how he shot him the day that he killed him; did he detail the particulars, or how he killed him?

A. He said he didn't tell him how he killed him; he just said that he shot him; he didn't say whereabouts he shot him, or nothing. He says that Eli told the man to go away from there, and the man wouldn't, and he killed him.

Cross-examination by Mr. JAMES K. BARNES:

Q. Ask him when was this that he told him he killed the man.

A. It was along in the month of October, he says.

Q. What time in October?

A. He says he does not remember as to what time of the month it was.

Q. Ask him where he had been that day—that is, where the witness had been.

A. He was at Jerry's, he said, when Eli told him.

Q. But where had he been that day? Ask him if he had been at the ball play that day.

A. No, sir; he hadn't been anywhere that day; he had been there all that day.

Q. Ask him if that was after the ball play was over on San Bois.

A. He said there was a great many ball games played around there, and he don't remember just as to whether that was after that game or not.

Q. Ask him if that was not after the second ball play over on San Bois.

A. He says he thinks it was before they played the game of ball at San Bois when he told him that.

75 Q. Ask him if he was at the ball play out on Devils Prairie, near Iron Bridge.

A. Yes, sir; he was there.

Q. Ask him if it was after that.

A. Yes, sir; it was after that.

Q. How long after that?

A. He says he does not remember how long it was afterwards.

Q. Ask him if it was not after the first ball play up on San Bois that he told him that.

A. He says he does not remember as to whether it was after that ball play or not.

Q. Ask him how many ball plays did they have on San Bois.

A. He said they had several games there during that fall, or the fall, and he does not remember; there was lots of games of ball that they had that he did not go to.

Q. Ask him if he did not go to the second ball play that Eli Lucas went to, with Eli Lucas, on Devils Prairie, and if Isaac King wasn't along, and Jefferson, Brown, John Ellis and his wife, Joe Burns, and John Jones and wife, and himself and wife, and if all of them didn't go there together and come away together.

A. Yes, sir; he said him and Eli Lucas all was together when they went to the second ball game at Devils Prairie.

Q. Ask him if they didn't come back together, and come back by Jerry Fullsom's.

A. He said the balance of the gang, he supposes, they were all together, but he went home by himself.

Q. Ask him if he didn't come back with Isaac King and his wife, John Jones and his wife, and John Ellis, Wallace Jefferson, Eli Lucas and wife.

A. He said they all came after he got home; that gang.

Q. Ask him if he didn't come back with them, and if they didn't stop at Isaac King's, he and Wallace Jefferson.

A. He said no, sir; he wasn't with Wallace Jefferson at all when coming back from the ball game.

Q. Did he stop at Isaac King's?

76 A. The second ball game, he wants to know?

Q. Yes; on Devils Prairie, near Iron Bridge.

A. Yes, sir; he said he went by Isaac King's, and stopped there a minute or two, and went on to Jerry Fullsom's, coming back from the ball game.

Q. Ask him if Eli Lucas was not with him.

A. He was by himself, he says.

Q. He says that this man told him in October. Ask him if he does not know that those ball plays on Devils Prairie, near Iron Bridge, were both in September.

A. He says that was in October.

Q. When he told him?

A. No; when they played the game there at Devils Prairie.

Q. He said a while ago it was in September.

A. I know he did, but he says October now.

The ASSISTANT DISTRICT ATTORNEY. Didn't he say Iron Bridge?

The INTERPRETER. It is the same thing.

Mr. JAMES K. BARNES (of counsel for defendant). Ask him if he did not tell us that both of these plays were up there in September, near the Iron Bridge on Devils Prairie; if he didn't tell us that a while ago.

A. He said they played there in September and October both. He said the neighborhood of Panther and Iron Bridge played against each other, and they beat them in September, and they appointed another day in October to play, and they played another game in October.

Q. Ask him if he does not know that both of these plays were down there in September, and the other plays were down at San Bois in October, and if he has not already stated it that way.

A. He says he didn't say that.

Q. Well, we all remember whether he said it or not. Ask him if he did not tell us that Eli told him this in October, and both plays was over up on Devils Prairie or near the Iron Bridge; that it was after both of these ball plays that Eli told him.

77 A. Yes, sir; it was after the game was on Devils Prairie when he told him.

Q. The last game?

A. Yes, sir; he said it was after the last game.

Q. How long after the last game?

A. He says he does not know just how long it was.

Q. Tell him to tell us about how long it was.

A. He said he supposes it was about one or two weeks.

Q. About two weeks after the last play?

A. Yes, sir.

Q. On Devils Prairie?

A. Yes, sir.

Q. And that was at Jerry Fullsom's?

A. Yes, sir; that is where he told him at—at Jerry Fullsom's.

Q. Ask him if it is not true that he never had but one conversation with him about this, and if it is not that way that he stated it before the commissioner.

A. He said he only had one conversation with him.

Q. Then ask him why did he tell the assistant district attorney that he had two conversations with him a while ago.

A. He says he don't recollect of only telling of one conversation.

The ASSISTANT DISTRICT ATTORNEY. I understood him to say one.

Mr. JAMES K. BARNES (of counsel for defendant). Ask him if he did not tell it this way before the commissioner—ask him if the commissioner didn't ask him where it was at, and if he didn't say "Jerry Fullsom's."

A. Yes, sir; he said there is where he said it was, and there is where he told him. He says that is where he staid.

Q. That is where who staid?

A. This man.

Q. Ask him if he was not asked this question before the commissioner and if he did not make this answer: "Q. Ask him whether he told him it was in the daytime or nighttime.—A. He says it was about this time in the day (about 10:30)."

A. Yes, sir; he said he told him it was about that time of day—something near 10:00 o'clock.

Q. Ask him if he told him what he done with the body.

78 A. He said he didn't tell him anything about the body.

Q. Ask him if he told him how he come to kill the man.

A. He said he told him that he told this man to leave there, and he wouldn't, and he killed him. He says that is the language that he used to him.

Q. Ask him if he told the commissioner that.

A. Yes, sir; he says that is what he told the commissioner.

Q. He says he told him to leave there?

A. Yes, sir.

Q. Now, ask him if he told the commissioner that he went there and shot him one day, and then went back and shot him the next.

A. He said he told the commissioner that he recollected that this man said he told him to leave, and he didn't leave, and he shot him, and the next morning he went and killed him.

Q. He says he told the commissioner that?

A. Yes, sir.

The COURT. Were you before the commissioner as interpreter, Mr. Morris?

The INTERPRETER. No, sir; I wasn't.

Mr. JAMES K. BARNES (of counsel for defendant). Ask him if this was not what he said; ask him if the commissioner didn't ask this question, if Eli told him whether it was in the daytime or night, and if he said, "It was about this time in the day (about 10 o'clock)" that it was, and if that is not all he ever told the commissioner about when he did the shooting?

A. He said yes, he told the commissioner it was somewheres aloing about that time of day; he reckons it was near 12 o'clock.

Q. Ask him if he ever saw that colored man.

A. He said he seen him once.

Q. Where?

A. Beyond Jerry's house there.

The COURT. Jerry Fullsom's?

The INTERPRETER. Yes, sir; beyond Jerry Fullsom's.

79 Mr. JAMES K. BARNES (of counsel for defendant). How far beyond Jerry Fullsom's house?

A. He said he reckons it was about a quarter of a mile beyond Jerry Fullsom's.

Q. What was he doing?

A. He said he seen him standing in the road.

Q. What was he doing? Ask him what kind of a hat he had on.

A. He said he didn't have on any hat.

Q. Ask him if he talked to him.

A. He said he only spoke a few words to him, and the man said he was hunting a job, a place to work at.

Q. Ask him if he saw him before or after that.

A. No, sir; he never saw him before that or since that.

Q. What was he doing at Jerry's? How come him to go there—that is, Mack King?

A. He said he had just been there some time, a making his home, staying there.

Q. This witness?

A. Yes, sir.

Q. Was Eli staying there, too?

A. Yes, sir; Eli staid there, he said.

Q. Ask him if he did not say that he just went there a few minutes and saw Eli and went away.

A. No, sir; he says he didn't say that.

Q. Was his wife staying there at Jerry's, too?

A. Yes, sir; he said his wife was Jerry Fullsom's daughter, and she staid there.

Q. Has he ever been brought down here on any charge?

A. No, sir; never has been brought here on any charge.

Q. Was he ever arrested up there in the Choctaw Nation?

A. Yes, sir; he said he was arrested there for living with a woman in illegal cohabitation.

Q. Living in adultery with a woman?

A. Yes, sir.

Q. Ask him how many times he was arrested there.

A. He said he was arrested at the McAlester court once.

80 J. The Indians arrested him, didn't they? I know about that; I will ask him about that directly, but the Indians arrested him one time, didn't they?

A. He says he was only arrested one time by his own court.

Q. They convicted him, didn't they?

A. Yes, sir; he said he plead guilty to the charge.

Q. Ask him if he wasn't arrested and taken to McAlester, too, or Muskogee. Wasn't he in the Muskogee jail a good while?

A. Yes, sir; he said he was in the Muskogee jail.

Q. How long?

A. He said he thinks he was in there about two or three weeks.

Q. What was the charge against him?

A. He was charged with introducing whiskey, he says.

Q. Ask him what else he has been charged with.

A. He says them is the only times he has been arrested.

Q. Hasn't he been down here in prison?

A. No, sir; he has not ever been down here as a prisoner, he says.

Q. Now, he speaks about going there to the remains; ask him when that was he went to where the bones were.

A. That was in November.

Q. Ask him if that wasn't the 12th of December—Thursday, the 12th of December—and if he has not heretofore stated that, too.

A. He said he said it was the 12th of November before the commissioner.

Q. They have got him wrong, unfortunately. Ask him the reason why he didn't go to that place and look for that man and see if Eli had killed him—why he didn't go there if Eli had told him he had killed him up there near McGilberry's.

A. He said the reason he didn't he said he didn't believe Eli?

Q. Ask him if Eli wasn't laughing and joking, and if he didn't take it as a joke.

A. He said no, sir; he wasn't laughing and joking, or anything

81 of the kind. He just told him that, and he just did not believe it, for he didn't pay any attention to it.

Q. Ask him if he did not tell the assistant district attorney that a while ago.

A. No, sir; he said he didn't say that.

Q. Who was present?

A. Him and Cornelius Brandy were together.

Q. Ask him what made him think Eli was joking.

The COURT. He didn't say he thought he was joking. He said he did not believe him.

Mr. JAMES K. BARNES (of counsel for defendant). He said that a while ago, your honor.

The COURT. I think you are mistaken about this witness saying that.

Mr. JAMES K. BARNES (of counsel for defendant). Ask him if he did not say that he thought he was joking, and if that is the reason why he didn't go.

A. No, sir; he didn't say that he said he believed he was joking; he just said he didn't believe him was the reason he didn't go and look for him.

Q. Ask him if he can not understand English pretty well.

A. He says he can understand English some, but he can't talk English. He does not understand it all, but he understands some.

Q. Ask him if he denies that he told the assistant district attorney that he said he was joking and he didn't believe him.

The COURT. He said a while ago he did not say it to the assistant district attorney. That is a denial of it. There is no use to go over it again.

Mr. J. K. BARNES (of counsel for defendant). Q. Now he speaks about going to the place where he found the skull and bones. Ask him what they did with the bones they found.

A. He said there was a little small tree there, and they didn't find all the bones, they reckoned; but they piled them under the a little small tree; put them in a pile.

Q. Ask him if they did not put a rock on the bones, too.

82 A. He said that they piled all the bones down under the tree and put the old clothes that was there on the bones, and then put some rocks on top of it.

Q. Ask him what did they do with the skull and things.

A. He said Jonas Thompson carried the skull to Jerry Fullsom's.

Q. Ask him how far from this place where they found the bones was Jerry Fullsom's.

A. He said he thinks it was about two and a half miles; two and a half or three miles, he says.

Q. Ask him whereabouts at Jerry's was it that he had this conversation with the defendant, Eli Lucas.

A. He said they were upstairs in the room when he told him.

Q. Ask him how come Eli to tell him that.

A. He said he didn't know why he told him; he just told him, he guesses, for him to hear of it.

Q. Was Eli drunk or drinking?

A. He says he wasn't drinking at that time, he didn't think, at all.

Q. Was Cornelius Brandy drinking?

A. No, sir; he said they were not any of them drinking at all.

Q. Ask him if he does not know that Cornelius Brandy has been convicted of larceny.

The COURT. That is not material.

Mr. JAMES K. BARNES (of counsel for defendant). He says he was with him.

The COURT. That does not make any difference if he was. That is not a fact that affects the testimony of this witness.

The ASSISTANT DISTRICT ATTORNEY. And I have not offered the other one.

The COURT. No.

Mr. JAMES K. BARNES (of counsel for defendant). My object was to show that he was placing a man with him that he knows was convicted of larceny, and this other man therefore could not either corroborate or contradict him.

83 The COURT. That amounts to nothing.

The ASSISTANT DISTRICT ATTORNEY. Haven't you got him here?

Mr. JAMES K. BARNES (of counsel for defendant). I have him here, but I didn't know until he came up as a witness that he had been convicted of larceny.

The COURT. That is not relevant as affecting this witness.

Mr. JAMES K. BARNES (of counsel for defendant). Ask him if Cornelius Brandy was drinking.

A. He just said that he wasn't drinking.

Q. Ask him if Jerry Fullsom didn't keep whiskey there at that house all the time, and if Jerry is not always drunk, nearly, and if they do not keep a drunken crowd around there.

A. He said here some time ago that Jerry Fullsom used to keep some whiskey there.

Q. Ask him if he is living with Jerry Fullsom's daughter now.

A. Yes, sir.

Q. Ask him when was it they had him harnessed up for living with that woman.

The ASSISTANT DISTRICT ATTORNEY. What does that mean?

Mr. JAMES K. BARNES (of counsel for defendant). I want to know if it was before or after——

The ASSISTANT DISTRICT ATTORNEY. I want to know what your question means.

Mr. JAMES K. BARNES (of counsel for defendant). It goes to affect the credibility of the witness.

The ASSISTANT DISTRICT ATTORNEY. You don't understand what I mean. I don't know what you mean by "harnessed up."

Mr. JAMES K. BARNES (of counsel for defendant). I mean arrested. He knows what I mean.

A. He says he thinks that was in 1892 that he was arrested about being there living with this woman.

84 Q. Was that after he married Jerry's daughter? Ask him.

A. Before he married Jerry's daughter.

Q. And he plead guilty to that?

A. Yes, sir.

Q. Ask him who went to the place where the bones were found.

A. He said there were about eight of them altogether when they went out there.

Q. Can he name any of them?

A. Yes, sir; he says he can.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Ask him if they found any hat there where they found the body or bones.

A. He said there wasn't any hat.

Q. Ask him if there was any shoes or any boots or anything of that kind.

A. No, sir; no shoes or boots.

Recross-examination by Mr. JAMES K. BARNES:

Q. Ask him who was with him when he went to where the bones were found.

A. Willie Stabley was one, and Jerry Fullson, Mathew Henry, Siah Sexton, Bill Hawkins, and Wallace Webster.

Q. Ask him if he told anybody about this—who he first told about it.

A. About which?

Q. About what Eli told him.

A. He said he didn't tell anybody anything about it, what Eli had told him.

Q. Ask him if he didn't tell Jerry Fullsom that.

A. He said he didn't tell Jerry Fullsom or anybody about it.

Q. Ask him if he told John Ellis and John Jones or any one else before he was brought here as a witness.

85 A. He said he didn't tell anybody anything about it.

Q. Not at any time at all?

A. He said he didn't tell anybody anything about it until when he told it here before the court.

(Witness excused.)

86 JERRY FULLSOM, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. I live at Panther.

Q. In the Choctaw Nation?

A. Yes, sir.

Q. Do you know the defendant, Eli Lucas?

A. Yes, sir.

Q. Did he ever work for you?

A. He never done any work for me; he s'aid there with me about a month.

Q. When was that?

A. That was along in September, and along in a part of October.

Q. Did you know the colored man, Levy Kemp, that was said to be killed?

A. No, sir; I didn't know him at all.

Q. Did you ever see him?

A. No, sir.

Q. Did Eli Lucas tell you anything about killing the colored man?

A. Yes, sir.

Q. What did he tell you?

A. He come to me and told me that he had killed a nigger, and I says, "What nigger?" and he said "That crazy nigger that had been around here." I had heard of a crazy nigger being around there, but I never had seen him at all. I says, "What did you kill him for?" I first asked him, "Did you do it sure enough?" and he said "Yes," and I says

"What did you do it for?" He says, "Well, just to be doing. He was crazy, and I didn't think he was any good." I asked him where he killed him at, and he said over there in the prairie by Will Bumm's pasture. I just put it up that he was just talking to hear himself talk, because I had been over in that prairie and all around there, and I never seen any such thing, and I never paid any attention to it; but after-
87 wards, some time afterwards, Isaac King came to my house and told me that Eli Lucas had killed that nigger, and that he had told him where he had killed him at. I told him that Eli had told me that, but I just supposed he was talking to hear himself talk and so I never paid any attention to it, and he told me that he killed him over by Bum's pasture, and I knew there was nobody killed over there, because I had been over there a good many times. He says, "That is not the place he told me; he told me right where he had killed him, and he said if I didn't believe it for me to go over there and I would find him." While he was telling me this George Riddle came in. He came in while Isaac King was telling me this, and he told me right where Eli had told him that he had killed this nigger, and George then went over and told Jonas Thompson——

Mr. JAMES K. BARNES (of counsel for defendant). Don't tell what other people did.

The ASSISTANT DISTRICT ATTORNEY. Was there a crowd made up to go?

A. Yes, sir; Jonas Thompson brought the crowd there to my house and got me to go with him, and Isaac King had told me right where Eli had told him he had killed him at, and I knew the country and I went over there, and went right straight and found the bones.

Q. What did you find there?

A. We found a skull there and, I think, a few bones; I could not tell you what part; some few of the ribs. He had been dragged around by some varmi'ts, I guess, or some things; I think hogs or something had had hold of him. He had been drug around right smart. He had been drug around over a good piece of ground; about as big as this house, I reckon, where we found him.

Q. Were there any clothes?

A. Yes, sir; we found pieces of clothes there.

Q. Any hat?

A. No, sir; I don't think we found any hat.

Q. Did you find any boots or shoes?

88 A. No, sir; I don't think we did.

Q. What was done with the bones and the clothes?

A. We piled the bones under a tree and threw some leaves over it, and took the skull over to my house; and there was a man lived there by the name of Drenning (?), said to be a deputy marshal, and we reported the matter to him and took the skull over to him.

Q. That was in the Choctaw Nation where they were found?

A. Yes, sir.

Q. About how far is it from here?

A. It is, I suppose, about 48 miles, I guess.

Q. In the jurisdiction of this court?

A. Yes, sir.

Cross-examination by Mr. JAMES K. BARNES:

Q. You say that Eli staid with you about a month in September?

A. He staid with me in the month of October.

Q. You told us a while ago it was in September.

A. No, sir; I did not.

Q. That is the way I put it down.

A. If you did, I didn't say it.

Q. Who was present when he told you about that?

A. There wasn't anyone present.

Q. No one was present?

A. No, sir.

Q. Was it in your house?

A. No, sir; I had been out to the lot feeding the stock, and had just got to the lot gate when he met me and stopped me and told me there.

Q. Was that in the daytime or nighttime?

A. In the daytime.

Q. What time in the day?

A. I guess it was in the evening; I was out feeding.

Q. Did he tell you when he killed him?

A. He didn't say when.

89 Q. He said he killed him by Bum's field?

A. He told me he was going back from a ball play and he had emptied his gun all except one shell, and he shot that nigger and went on, and he went back to kill him. He went on to get some more cartridges, and went back and killed him another time. I didn't ask him how long afterwards.

Q. Did he say when he went back and killed him?

A. I didn't ask him how long afterwards. He said he went back and killed him.

Q. When did he tell you that?

A. In the month of October.

Q. How long did he stay at your house after that?

A. I suppose maybe two weeks.

Q. You let him stay there two weeks after he told you he had murdered a man, did you?

A. Yes, sir; he stayed around there; he never stayed there all the time. He made that his home. He would just come ther' a few hours and then come and stay all night, and off again.

Q. You let him stay there. He told you the man was by Bum's field. Was it in Bum's field?

A. He said over there in the prairie by Bum's pasture.

Q. You knew it was not there, didn't you?

A. I knew he wasn't there, because I had been around there a good deal. That is the reason I never looked after it any sooner.

Q. When was it he told you it was another place?

A. He didn't tell me any more about it; he told Isaac King, and Isaac King was the man that came to my house and told me.

Q. Oh, yes; he told you that he killed him by Bum's field?

A. Eli did, and Isaac King told me it was another place; that Eli had told him that he had killed this nigger at another place, and if he did not believe it to go over there and look.

Q. That is what Isaac King told you?

A. Yes, sir; and I got up a crowd and went over there and
90 found him right where Isaac King had told me that Eli told him that he killed him.

Q. You are telling something that somebody else told you, and that is not competent.

A. We found the dead man, no matter who told it.

Q. Of course I object to that. I didn't understand it that way a while ago. Then he never told you that he killed the man where you found the remains?

A. Eli didn't tell me himself.

Q. How far was it from the place where Eli told you?

A. It was about a mile.

Q. On a ridge, wasn't it?

A. Yes, sir.

Mr. JAMES K. BARNES (of counsel for defendant). What Isaac King told this witness I will ask to have excluded.

The COURT. Yes; that will not be considered as evidence.

Mr. JAMES K. BARNES (of counsel for defendant). Were you ever charged with any offense?

A. No, sir.

Q. You were down here at the last term of court, were you not?

A. Yes, sir.

Q. You fell through the trestle over here, didn't you?

A. Yes, sir.

Q. How come you to fall through the trestle?

A. I was walking along there and fell off.

Q. What was your condition when you fell off?

A. I was drunk, I guess.

Q. You were going over to these—what were you doing over there?

A. I don't know.

Q. You didn't know anything about it, did you?

A. No, sir.

Q. The case had to be continued on that account, didn't it?

A. I suppose so.

Q. Did you kill this boy's (the defendant's) uncle up there in the Choctaw Nation?

A. No, sir.

91 Q. Didn't you kill his uncle at your store?

A. No, sir.

Q. Who was it that you killed?

A. I never did kill anybody.

Q. You were charged with it, wasn't you?

A. If I was I don't know anything about it.

Q. Haven't you heard that you have been charged with killing his uncle?

A. No, sir; I have heard hearsay about it, but then——

The ASSISTANT DISTRICT ATTORNEY. That is not competent. If anybody has any charge against him let them present it.

Mr. JAMES K. BARNES (of counsel for defendant). If that is excluded I object to it, and I want an exception noted.

The COURT. Why di' you ask it?

Mr. JAMES K. BARNES (of counsel for defendant). To show his feeling towards the defendant.

The COURT. You don't know how many crimes you have been charged with. Every man has been charged with something. It has to come with some degree of certainty—he has to have been arrested, or indicted, or convicted, or something of that kind. You can not prove mere neighborhood rumor against a man. You could convict every man on earth in that way.

Mr. JAMES K. BARNES (of counsel for defendant). Can I prove by him that he has been charged there with killing the defendant's uncle?

The COURT. You can prove that he has been charged or arrested by some court, but that somebody in the neighborhood may have said it is not competent.

Mr. JAMES K. BARNES (of counsel for defendant). Well, I object to it. (To the witness.) Did you know Wilson Hoklochc?

A. Yes, sir.

Q. I will ask you if you did not pick up a rock and kill him while he was drunk at your store?

A. No, sir; I never killed him at all.

Q. Isn't he the uncle of this defendant?

A. I don't know whether he is any kin at all or not. I never
92 did kill a man in my life that I knew of. I knoew, too, there was a man killed there.

Q. Did you know that man?

A. Yes, sir; I rec'llect the time he was killed, but I didn't kill him.

Q. He was killed there at your place?

A. He was killed there at the store.

Q. In a drunken row?

A. Yes, sir; it was in a drunken row, I suppose.

The COURT. I think that is too remote.

Mr. JAMES K. BARNES (of counsel for defendant). Where were you?

A. I was at home.

Q. You say he told you in October. Why didn't you go down there and look for that man?

A. I had nothing to do with a drunken row down there.

Q. You let two months go by before you went to look for him?

A. Oh, this darky, do you mean?

Q. Yes.

A. Well, I suppose it was six weeks, I guess, when we went to look for him.

Q. You did not believe Eli's story, and you didn't go?

A. I did not much believe him, because he told me—I asked him, "Where did you kill him at?" and he said, "Over there by Bum's pasture." That is what he told me.

Q. That is on the prairie?

A. Yes, sir; Wild Horse Prairie.

Q. You found his remains on the mountain, or on the ridge, didn't you?

A. Yes, sir; we found them on the ridge right north of Stephen McGilberry's house, about three-quarters of a mile.

(Witness excused.)

93 JOHN JONES, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Your name is John Jones?

Answer. Yes, sir.

Q. Where do you live?

A. I live at Panther.

Q. You are a citizen of the Choctaw Nation, are you?

A. Yes, sir.

Q. Do you know the defendant, Eli Lucas?

A. Yes, sir.

Q. Did you know Levi Kemp, a colored man that some of them called the "crazy nigger" up there?

A. Yes, sir; I saw him there several times.

Q. Did Eli Lucas ever tell you anything about killing him?

A. Yes, sir; he told me about it.

Q. What did he say to you, Mr. Jones?

A. He says, one time we were over at Isaac King's, we were all eating supper, and he came up, and he was drinking, and he came up there, and he said he killed the darky, and he pulled out the pistol, and he said, "Here is the pistol; there is the one I done it with," he said. He said when he shot him the first he didn't die, and he went back and he got some more cartridges and he came back there and he finished up.

Q. Did he say how many times he shot him the first time?

A. I don't remember how many he said.

Q. But he shot him one time, and then went and got some cartridges?

A. Yes, sir; and finished it then.

Q. What did he say about shooting him the second time?

A. He told me that he was laying down by the fire, and he came up and he said he shot him, and he said, "Don't shoot me; somebody has been shooting me, and I have been bad off;" and he said, "Come
94 and go with me," and he said he wanted a piece of bread, and he said, "Well, I will give you a piece of bread," and he said he took him down the hill and just poured down on him, and he fell down by a limb, and he said there was a tree standing up, and it was right there where he was found.

Q. Did he say anything as to in what part of the body he shot him?

A. He said he shot him in the body along here [indicating in breast].

Q. Did he say anything about whether he shot him after he was down?

A. No, sir; he didn't say about that.

Mr. JAMES K. BARNES (of counsel for defendant). I object to the question, and ask that an objection be noted.

The ASSISTANT DISTRICT ATTORNEY. Where was it he told you this?

A. At Isaac King's house. He told around there all the time; he would tell every day, pretty near everywhere.

Q. You heard him talk about it more than once, did you?

A. I heard it lots of time'. Isaac King here knows it, too. He told him about it. He told me and Isaac King.

Q. Were you with the parties that found the body?

A. No, sir; I wasn't along at that time.

Q. Were you ever at the place?

A. Yes, sir.

Q. How far is it from the road, from the road one would travel going from the ball play back to McGilberry's?

A. It must be something like about 50 yards, or maybe more.

Cross-examination by Mr. JAMES K. BARNES:

Q. Where did he first tell you this, or where were you when he first told you?

A. At Isaac King's house.

The ASSISTANT DISTRICT ATTORNEY. There is another question I want to ask the witness. Was there any limb or log or anything
95 lying near where the body was?

The WITNESS. Yes, sir; he said there was a limb there.

The ASSISTANT DISTRICT ATTORNEY. Did Eli tell you anything about that?

Mr. JAMES K. BARNES (of counsel for defendant). I object to that question. It is leading.

The ASSISTANT DISTRICT ATTORNEY. Did he say anything about that limb?

The WITNESS. Yes, sir; he said, "If you do not believe me, come and go with me and I will show it to you," and I laughed at him, and he slapped me on the shoulder and went on, and he said, "If you don't believe me, just come and go with me and I will show you where that dead man is."

Mr. JAMES K. BARNES (of counsel for defendant). Did he tell you where he went to get the cartridges?

A. No, sir; he didn't tell me that.

Q. Did he tell you when he killed the man? Did he say when he killed him?

A. Yes, sir; he told me he killed him.

Q. When?

A. I don't know—I don't remember what time it was. I know it was in October the ball play was, but this was a good while, I guess, after that ball play was over. I don't remember what the month was, and the day.

Q. Who heard him tell you that?

A. Isaac King and my wife, and my sister. All of them heard it.

Q. Did you tell before the commissioner that Isaac King heard that?

A. I don't know whether I did or not; I don't remember.

Q. Don't you know you didn't?

A. I don't know what I said. It is so long I have forgot. I don't know.

Q. Don't you know you didn't tell the commissioner that Isaac King and your wife heard that, and your sister?

A. I don't know; I have forgot about that.

96 Q. Was there anybody else present? Did there anybody else hear him tell you that at that time?

A. Them three heard it.

Q. Was there anybody else present when he told you that?

The COURT. He wants to know if anybody else heard that besides you. You answered it once before, but repeat the answer.

The WITNESS. These three heard it.

Mr. JAMES K. BARNES (of counsel for defendant). Well, at that time did anybody else hear it?

A. No; I don't reckon not.

Q. I will ask you if Henry Gains and Houston Nelson——

A. Henry Gains don't live in that country at all; he has been gone.

Q. That does not make any difference. You answer my question. Did Henry Gains and Houston Nelson hear what he told you about killing the man?

The ASSISTANT DISTRICT ATTORNEY. Did they hear him when he told you? That is what he wants to know. Were they present and hear Eli Lucas tell you about it?

The WITNESS. I guess I will have to get an interpreter.

Mr. JAMES K. BARNES (of counsel for defendant). No, you won't have to; you understand English well.

The COURT. He wants to know if these two men he has named besides your wife and your wife's sister heard him when he told you that?

The WITNESS. Them two fellows wasn't there at all.

Mr. JAMES K. BARNES (of counsel for defendant). They were not there at all?

A. No, sir.

Q. You say Henry Gains is in Texas?

A. He went with his father. He went off somewhere; I don't know where he is.

Q. You heard he went off to Texas?

A. Yes, sir.

Q. I will ask you if you did not make this statement—didn't the commissioner ask you this question: "Q. Did he tell any one else
97 about it?" And did not you say that "he told Henry Gains about it and he told Houston Nelson about it?"

A. I don't reckon not that I told the commissioner about that.

Q. Do you deny telling the commissioner that?

A. I just forget; it has been so long.

Q. You said Henry Gains was in Texas a while ago. Didn't you tell the commissioner these two men heard that when you were down here as a witness against this man?

A. I don't know. I have forgotten about that.

Q. Didn't you tell him that Houston Nelson heard it, and in response to this question: "Q. Were you present when he told these two men that?" didn't you answer "Yes, sir?"

A. I don't know what I told the commissioner. I have forgotten; it has been so long.

Q. Is that true or false? Did you tell the commissioner the truth?

A. Yes, sir; I was telling him the truth.

Q. Didn't you tell him that—that you heard this man tell Henry Gains and Houston Nelson, and that you were present when he did?

The ASSISTANT DISTRICT ATTORNEY. He has answered that two or three times.

The WITNESS. Houston lives away yonder; he don't live there.

Mr. JAMES K. BARNES (of counsel for defendant). You will not answer my question?

The ASSISTANT DISTRICT ATTORNEY. He has answered it two or three times already.

Mr. JAMES K. BARNES (of counsel for defendant). I will ask you if Houston Nelson is not here now?

A. Yes, sir.

Q. He is a Choctaw, is he not?

A. Yes, sir.

Q. He talks English some; does he not?

A. Yes, sir; I guess so; a little.

Q. What did Eli tell you when he came to Isaac King's?

98 A. We were all in at supper, and he came up, and we were eating supper, and he said he wanted something to eat, and we got a place for him to eat, and he went on to tell about it.

Q. What did he say?

A. He said he killed a darky down there, right across from Stephen's house; he said he killed a nigger down there. That is what he said. He said "I wanted to see him kick. That is the reason I killed him."

Q. Wanted to see him jump?

A. Yes, sir; that is what he said.

Q. Wanted to see him kick. Did he say how many times he shot him?

A. He said he shot him once, and he didn't have but one cartridge, and the next time he came back he finished him up.

Q. Did he say he had just come from there?

A. He said he passed there.

Q. Had he just come from there when he told you that?

A. No, sir; it was a good long time, I guess.

Q. Did he tell you where he went to when he shot him?

A. He was staying at Jerry's then.

Q. Did he tell you where he went to then when he shot him?

A. He said he went to Stephen's.

Q. Did he tell you that he went back?

A. I don't know where he went from there. He said he went to Stephen's. He said as soon as he killed him he went down to Stephen's.

Q. Didn't you swear he told you this: "He killed him just to see him jump; he said the first time he shot him he jumped away up, and when he shot him again he fell back over between some logs and some blood flew on him, and then he rode over to Hannah Sockey's?"

A. That is Stephen's.

Q. I understand that.

99 The ASSISTANT DISTRICT ATTORNEY. Let him answer.

Mr. JAMES K. BARNES (of counsel for defendant). Didn't you say this, that he said the first time he shot him he jumped away up, and the next time he fell between some logs, and then some blood flew on him?

A. Yes, sir. He said it made him sick, and he could not eat for a long time, he said.

Q. What is the reason you did not tell that before the commissioner?

A. I think I told that, if I am not mistaken.

The COURT. That is in the commissioner's examination, is it not?

Mr. JAMES K. BARNES (of counsel for defendant). Part of it is. (To the witness.) You say this was a long time after the ball play he told you this?

A. Yes, sir; it was a good while after that.

Q. What ball play?

A. Down at the Seven Devils Prairie.

Q. Which one of the ball plays was that?

A. That was the one.

Q. How many did they have down there?

A. They had one down there. We had it twice down there at the Seven Devil Prairie and one down close to Bolin McKinney's.

Q. Only once down at Bolin McKinney's?

A. Twice, I believe; I don't know how many times we played.

Q. They had two up there on Seven Devils Prairie?

A. Yes, sir; we had two there.

Q. After which one of those was it?

A. I believe it was after the last one.

Q. Didn't you come from that ball play with him?

A. No, sir.

Q. I will ask you if you and your wife, Cornelius Brandy and Joe Burns, John Ellis, Wallace Jefferson, Isaac King, Mack King and wife didn't go to that second ball play together?

A. We went twice; both times.

Q. Didn't you go with Eli and the parties I just called over to
100 that second ball play?

A. No, sir; I believe not.

Q. And then I will ask you if Isaac King, Mack King and wife, and John Jones and wife, yourself, John Ellis, Wallace Jefferson, and Eli Lucas and wife didn't come back together, and if you and your wife and Wallace Jefferson did not stop at Isaac King's, and he went on over then to Jerry's, about a quarter of a mile or half a mile away from ther', after supper?

A. He come part of the way the first or second; I don't know which.

Q. Don't you know he went to that first ball play with Stephen McGilberry?

A. He came up across that big spring and he turned off right there. He was riding one of Jerry's horses.

Q. Don't you know that was the first ball play up there?

A. I don't recollect.

Q. Don't you know you went to the second ball play with all of these parties whose names I have called, and that you returned with these parties whose names I have called? Just answer my question, now.

A. We all went right down to Isaac's, and that fellow he turned off and went towards Duke's, and Silas went up that way [indicating], and he went up that way [indicating], and that is the last time I saw him.

Q. Didn't you go to the ball play with him, and didn't you come back with him as far as Isaac King's? Just answer that yes or no? Didn't you all come back together? You can say yes or no to that?

A. The first time?

Q. I am asking you about the second ball play up there at Devils Prairie. Didn't you go with these partids and then come back with them?

A. I don't think that fellow went at all.

Q. You say you didn't go with him at all?

A. He went around to Jonas Thompson's to get some bitters and when he came back he was drunk.

101 Q. Was that the first or second ball play?

A. That was the second.

Q. Do you deny that he went over with you to that ball play?

A. We had done got there and he came over that way. He went down and got some bitters.

Q. Then you did go with him, didn't you?

A. No, sir.

Q. Didn't you go in the same party he went with?

The ASSISTANT DISTRICT ATTORNEY. He has answered it half a dozen times.

Mr. JAMES K. BARNES (of counsel for defendant). No, he hasn't.

The ASSISTANT DISTRICT ATTORNEY. I insist that he has answered that question half a dozen times, and he ought not to be compelled to answer it always.

The COURT. I think he has answered it, but you may ask it once more.

Mr. JAMES K. BARNES (of counsel for defendant). That second ball play. I will ask you this question: Didn't you go there with Isaac King, Wallace Jefferson, John Ellis, Joe Burns, Cornelius Brandy, Eli Lucas and wife, and your wife, and Mack King and wife? Didn't you go to that second ball play with these parties?

A. We were all going there, but Eli went up there to Jonases; he said he was going up there to——

Q. Did he go to the ball play with you?

A. He came up there when we were playing ball.

Q. Didn't you go with him there?

The COURT. Did this defendant start with you and go to the ball play that second time or did he come to the place afterwards where you were playing ball?

The WITNESS. He came to where we were playing ball.

102 The COURT. He didn't go with you at all then?

The WITNESS. No, sir.

Mr. JAMES K. BARNES (of counsel for defendant). Didn't he come back with you?

A. He come a little piece and turned off and went towards Duke's house.

Q. Duke who?

A. Duke Le Flore.

Q. Who is Duke Le Flore?

A. He is the Le Flore that is here.

Q. John Le Flore?

A. Yes, sir.

Q. I will ask you if he didn't come back with these parties, Isaac King, Mack King and wife, John Jones and wife—that is, yourself and wife—John Ellis and Wallace Jefferson, and also his wife, if you did not all come back together, and if you and your wife and Wallace Jefferson didn't stop at Isaac King's?

A. Wallace staid all night there.

Q. And you and your wife stopped there?

A. Yes, sir; we stopped there.

Q. Didn't he come back that far with you? Didn't he eat supper there?

A. He went off that way, and he went around that way [indicating].

Q. Just say no, if he didn't.

A. No; he didn't some with us at all.

Q. You say it was about two weeks after that last ball play that he told you that he shot the darky?

A. I could not say how long. It was a good some time.

Q. I will ask you if you did not tell the commissioner this, if you didn't make this statement to him: "Q. Wli Lucas is charged with killing a man. What do you know about it?" Didn't you make this reply: "We had a ball play down there and when we came back
103 he didn't come right back with us, and when he came in he said he had killed a nigger back there"?

A. When he came up there he told it.

Q. Isn't that what you told the commissioner, now? Don't dodge out. Didn't you tell the commissioner there that?

A. I guess so.

Q. Then why did you tell me a while ago that it was some time after that ball play until he told you that?

The ASSISTANT DISTRICT ATTORNEY. He does not say there the length of time.

Mr. JAMES K. BARNES (of counsel for defendant). Don't protect the witness when I catch him as completely as I have. I don't think it is fair.

The ASSISTANT DISTRICT ATTORNEY. You have not caught him at all in anything.

Mr. JAMES K. BARNES (of counsel for defendant). Why, didn't you tell us a while ago that it was some time after that ball play when he came in and told you, that he didn't come back as you come back, and that he came in and told you that he had killed the nigger. Why did you do that; why did you make such a statement as that?

A. He told around there so much; he just told it around there all the time.

Q. Don't you know you were before the commissioner, and you never told about him making any statement about this except what these commissioner's papers here show, and that was only one time? He never told you but one time, did he?

A. He told it around there all the time.

Q. Did he ever tell you but one time?

A. He told me at the table there.

Q. That is the only time, wasn't it?

A. Yes, sir; if I am not mistaken it was a good long time he told that.

Q. All you know is hearsay, what somebody else told you about what he said, except that one time?

A. No, sir; he told me himself.

104 Q. Well, he only told you one time, and that was at Isaac King's. Now, do you stick to that statement? Did he ever tell you any other time than at Isaac King's about that?

A. He told me and Cornelius and Mack, right in front of Jerry's house. He said: "Boys, where are you going? I know where you are going." Just laughed and went in the house. He thought we were going up to see about it.

Q. Were you present when Mack heard that?

A. Yes, sir; Mack heard it.

Q. You were present when he told Mack?

A. Yes, sir; he told Mack.

Q. In your presence? Did you hear him tell Mack?

A. He told us all.

Q. All of you three together?

A. Yes, sir.

Q. Then Mack don't bear you out. Were you ever brought down here as a prisoner? Were you ever arrested and brought down here?

A. No, sir.

Q. Were you ever arrested and brought down here?

A. In the U. S. court?

Q. Yes.

A. No, sir.

Q. You have been in the county jail often, haven't you?

A. No, sir; I was arrested a couple of times.

Q. What for?

A. Drunk.

Q. Haven't you been arrested in McAlester several times?

A. One time.

Q. What for?

A. Drunk and disturbing the peace.

Q. You have been arrested in the Choctaw courts, haven't you?

A. Yes, sir.

Q. For larceny or stealing?

A. That is what they charged me with.

(Witness excused.)

105 JOHN ELLIS, having been duly sworn upon behalf of the Government, was examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. I live close to Panther.

Q. Are you a citizen of the Choctaw Nation?

A. No, sir.

Q. Do you know Eli Lucas, the defendant?

A. Yes, sir.

Q. Did you know the colored man, Levi Kemp, that the defendant is charged with killing?

A. Well, no, sir; I don't know him.

Q. Had you ever seen him?

A. I saw him once.

Q. Did Eli Lucas ever tell you anything about killing him?

A. Yes, sir.

Q. What did he say to you?

A. He told me that he had killed him.

Q. Go on and tell what he said, if you recollect it.

A. He said that he killed that crazy nigger that was over there.

Q. Did he say why he killed him?

A. He said that he killed him because he was in the way, and he said he bothered this old lady, this old Hannah Sockey; he said he bothered her all the time for bread; come there and bothered her, and he said he just killed him to get him out of the way.

Q. Did he tell you where he killed him?

A. No, sir.

Q. When was it that he told you that he killed him?

A. It was some time in November when he told me. I could not say just when.

Q. Where was it?

A. At Jerry Fullsom's.

Cross-examination by Mr. JAMES K. BARNES:

Q. All the ball plays were over when he told you that, wasn't
106 they? Did you have any more ball plays after he told you that?

A. I don't remember.

Q. You say you are not a citizen of the Choctaw Nation?

A. No, sir; I am a white man.

Q. Do you live up there?

A. Yes, sir.

Q. You talk Choctaw, don't you?

A. Yes, sir.

Q. Are you married to a Choctaw?

A. No, sir.

Q. Are you married now?

A. Yes, sir.

Q. Were you ever charged with any offense here in this court?

A. No, sir.

Q. Up there in the nation?

A. I have been charged at McAlester once.

Q. What were you charged with up there?

A. Charged with disturbing the peace?

Q. He didn't tell you wher' he had killed this man?

A. No, sir.

Q. This was at Jerry Fullsom's, where he told you?

A. Yes, sir.

Q. In November?

A. Yes, sir.

Q. Who did you first tell about it?

A. I don't know as I told anybody until I was subpœnaed. I don't remember.

Q. Was he drunk or sober when he told you?

A. Well, he was drinking, or acted like he was, anyway.

Q. Was he joking when he told you that?

A. I do not know. He said it.

Q. You do not know whether he was joking or not?

A. I reckon not.

Q. When was it that he told you?

A. Didn't I tell you once?

Q. You said November.
A. That is right.
Q. Was it at night?
A. No, sir; it was in the daytime.
Q. What time in the day was it?
A. I don't know what time.
Q. Was it before or after dinner?
A. After dinner, I think.
Q. Didn't you tell him you didn't believe him?
107 A. I says, "It don't look"—I forget now what I did tell him, just. I believe I told him—I says, "You are just joking, are you not?" I believe that is all I said to him.
Q. And he said, "No, I am not," didn't he?
A. I don't remember what he said when I said that.
Q. Didn't he tell you "You will see?"
A. I won't say for certain. I don't remember whether he said that or not.
Q. You told him he was joking?
A. Yes, sir; I think that is what I told him.
Q. He was laughing, was he not?
A. No, sir; he wasn't laughing when he told me.
Q. Wasn't he drunk?
A. No, sir; he wasn't drunk. He might not have been drinking any. I suppose he was from the way he was acting.
Q. You suppose he was?
A. Yes, sir.
Q. Haven't you said he was drunk? Didn't you say a while ago he was drunk?
A. I said a while ago he was drinking.
Q. You now say he might not have been drinking at all. Why do you say that?
A. I suppose he was drinking, at least he was acting that way.
Q. Was he acting like he was drunk?
A. Oh, he was just going on like a man would when he was drinking. I never saw him take nothing.
Q. Did he act like he was drunk, or just drinking a little?
A. I don't know; he was just acting like he was drunk, I guess. He was around there laughing after that. After that I staid up there a good while until very near night, and he was laughing and talking foolishness around and joking after that, but he wasn't before that.
Q. At that time he was talking foolishness, you say?
A. Well, I would not call that foolishness. You might.
Q. He was laughing, you say?
108 A. After that he was. I staid there after that until about night. He was laughing and talking after that.
Q. What time did you leave there?
A. It was night when I left there.
Q. After dark?
A. No, sir; it was just about night when I left there. It wasn't dark yet. It was getting late.
Q. Didn't he tell you at night about that?

A. No, sir.

Q. He told you three or four hours before night, did he?

A. I don't remember of him telling me at night. If he did I don't remember it.

Q. Why didn't you ask him all about it?

A. That wasn't my business to ask him all about it.

Q. You didn't pay any attention to it. That is the truth of it, isn't it?

A. Well, he is not a reliable man, and I didn't pay any attention to it particularly.

Q. He just tells any kind of a yarn, doesn't he? Kind of a blowhard, is he?

A. I don't know whether you would call it a blowhard or not. He is not a reliable man every time.

Q. How about yourself. I want to see how reliable you are.

A. I can't judge for myself.

Q. We will judge you now. I will ask you if this question was not asked you before the commissioner: "Q. This man is charged with killing Kemp. What do you know about it? A. All I know about it is one night he was at Jerry Fullsom's house, and he was drunk, and he told me he had killed that nigger."

A. One night?

Q. One night. We want to see how reliable you are. You say Eli is not reliable. "He asked me if I didn't believe him, and I told him I didn't, and he said you will see. I never asked him much about it, as he was drunk."

109 A. There is a mistake about that, because I never said night; I left there before night.

Q. What about his being drunk?

A. I explained that to you a while ago the best I could.

Q. Did you make this other statement I read to you? Did you tell it this way before the commissioner: "All I know about it is one night he was at Jerry Fullsom's house, and he was drunk, and he told me that he had killed that nigger. He asked me if I didn't believe him, and I told him I didn't, and he says, you will see. I never asked him much about it, as he was drunk." Did you state it that way before the commissioner?

The ASSISTANT DISTRICT ATTORNEY. Which one do you want him to answer?

Mr. JAMES K. BARNES (of counsel for defendant). All of it. It is all one thing.

The ASSISTANT DISTRICT ATTORNEY. Then I object to it. The witness has answered part of the gentleman's question, and then he reads several questions and wants him to answer it again. I think the proper way is to take one thing at a time. I don't see how any man can answer a dozen things at once.

Mr. JAMES K. BARNES (of counsel for defendant). I read the very question that was propounded by the commissioner, and I asked him if he did not make that answer, and read the whole answer to him. I submit I have a right to have that question answered that way, and I ask him if he didn't make that statement before the commissioner.

The ASSISTANT DISTRICT ATTORNEY. He has answ'red it as far as you have asked him.

The COURT. Read it over again, and let's see what he says about it.

Mr. JAMES K. BARNES (of counsel for defendant). I will ask you if this question wasn't asked you before the commissioner: "Q. This
110 man Lucas is charged with killing him. What do you know about it?" and did you not say in answer to that question, "All I know about it is one night we were at Jerry Fullsom's house, and he was drunk, and he told me he had killed that nigger, and asked me if I didn't believe him, and I told him I didn't, and he says, you will see, and I never asked him much about it, as he was drunk."

A. Well, I think there is a mistake made about the night. I won't say for certain. But I left there before night. I left there before dark. I might have said it might have been in along before night.

Q. You say he told you that three or four hours before you left there?

A. He did.

Q. And said no more about it?

A. He told me some time in the evening. I won't say just what time it was, because I don't remember.

Q. What about the rest of it; you have heard it all.

A. About what?

Q. All I have read to you as your answer.

The ASSISTANT DISTRICT ATTORNEY. What part do you want an answer to now?

Mr. JAMES K. BARNES (of counsel for defendant). I want him to answer if that was his reply.

The COURT. If I understand him, he says it was his answer except there was a mistake as to the time.

Mr. JAMES K. BARNES (of counsel for defendant). I beg leave to differ in that regard. He has not said that.

The COURT. He said there was a mistake in the time, and the effect of what he said was that that was correct except that.

The WITNESS. That is correct except as to the time.

Mr. JAMES K. BARNES (of counsel for defendant). I want an objection noted to that.

111 The COURT. I do not see any ground for any objection. You asked the whole question, and he said there is a mistake about the time, and the effect of that would be, of course, that the balance was right.

Mr. JAMES K. BARNES (of counsel for defendant). This is the first time he said it was correct.

The COURT. He said that in answer to the question.

The WITNESS. I said there is a mistake about the time, because he didn't tell me in the night.

Mr. JAMES K. BARNES (of counsel for defendant). All he told you he just told you that he had killed the nigger?

A. Yes, sir; that is all he told me about it.

Q. Didn't tell you how he had shot him, or anything of that kind?

A. Yes, sir; he said that he shot him, and he said that he jumped when he shot him, and I believe—I won't say for certain—but I believe that he said he whooped.

Q. Jumped up and whooped, didn't he?

A. Yes, sir; I believe that is what he said.

Q. Then did he say that he shot him again?

A. He didn't say; if he did I don't remember it.

Q. Did he tell you what he shot him with?

A. Yes, sir.

Q. What did he say he shot him with?

A. Shot him with a pistol.

Q. Was there anyone present when he told you that?

A. Joe Burns came into the room about the time that he was finishing telling me about it.

Q. Did he hear you tell him; did he hear Eli tell you that?

A. I don't remember whether he did or not. He was just about finishing telling me that when Joe Burns came in. Jerry Fullsom's boy was around the house.

Q. I will ask you if you didn't tell the commissioner that it was Joe Brown?

A. No, sir; I did not. There is a mistake there.

112 Q. (Reading): "Q. Who was present when he told you this?

A. There wasn't anyone present. A few minutes after that Joe Brown walked in the room and he told him."

The ASSISTANT DISTRICT ATTORNEY. What was the man's name that did come in?

The WITNESS. Joe Burns.

Mr. JAMES K. BARNES (of counsel for defendant). (Reading): "Q. Were you present when he told Joe Brown? A. No, sir." Now, you say this was in November. I will ask you if you did not tell the commissioner it was in the middle of October, and if you didn't tell it that way all the time until you came down here as a witness? In response to this question before the commissioner: "Q. When did he tell you this? A. It was about the middle of October."

A. It was some time in November.

Q. I know that is what you state now, but did you tell the commissioner that?

A. That is what I told the commissioner, too.

(Witness excused.)

113 Thereupon the Government rested its case in chief.

Whereupon the defendant, to maintain the issues upon his part, produced and examined the following witnesses: Isaac King, Joe Brown, Houston Nelson, testimony of John Jones before the commissioner, testimony of John Ellis before the commissioner, testimony of Mack King before the commissioner, testimony of John Le Flore before the commissioner, testimony of Noah Holbrook before the commissioner, Wallace Jefferson, Hollis Jones, Betsy Nail, Charles Wade, Joshua Lucas, Tecumseh Whistler, Eli Lucas (the defendant), who testified, respectively, as follows:

114 *Testimony introduced by the defendant.*

ISAAC KING, having been duly sworn upon behalf of the defendant, was examined in chief by James K. Barnes, esq., and testified as follows, to wit:

Question. Where do you live?

Answer. San Bois County, Choctaw Nation.

Q. Are you acquainted with Jerry Fullsom?

A. Yes, sir.

Q. I will ask you if you ever told him at any time or place that Eli Lucas, the defendant, told you that he had killed a colored man or any other man?

A. No, sir; I never did hear it.

Q. You never did tell him that?

A. No, sir.

Q. Did you go to his house and tell him that, or at any other place? Did you ever tell Jerry Fullsom that—that Eli told you anything of the kind?

A. No, sir; I never did.

Q. I will ask you if you ever heard Eli say at your table in the presence of John Jones that he had killed anybody?

A. No, sir; I never did.

Q. Now, I will ask you, Isaac, last fall, along in September or October, where did you live?

A. I lived close to Jerry Fullsom.

Q. How far?

A. About half a mile.

Q. A little *bat* west or northwest, was it not?

A. Northwest a little.

Q. Little bit northwest of Jerry Fullsom's?

A. Yes, sir.

Q. Which direction did Hannah Sockey live from Jerry Fullsom's?

A. I could not tell, but it was about two miles from where I lived; about two or three miles from where I lived.

Q. I will ask you if she didn't live northeast of there?

A. Yes, sir; northeast, I guess; I don't know.

115 Q. I will ask you if you know where the Iron Bridge is?

A. Yes, sir.

Q. Do you know anything about any ball plays there last fall?

A. Yes, sir.

Q. How many did they have near the Iron Bridge?

A. They had two ball plays at the Iron Bridge.

Q. Was it at the Iron Bridge?

A. Seven Devils Prairie, near Iron Bridge, two miles this side.

Q. What direction is that from Jerry Fullsom's?

A. North.

Q. How far?

A. About four miles or five miles from Jerry Fullsom's.

Q. Did you see Eli Lucas at any of these ball plays?

A. Yes, sir.

Q. On the Seven Devils Prairie?

A. Yes, sir.

Q. Did you go there with him to any of these plays?

A. Yes, sir; at the second ball play me and Wallace Jefferson and Jerry Fullsom—Joe Burns, I mean.

Q. You didn't mean Jerry Fullsom?

A. No, sir; I didn't mean that. I was just mistaken. Joe Burns and Wallace Jefferson and Mack King and his wife and Johnnie Jones and his wife and Cornelius Brandy and Eli.

Q. Anybody else besides Eli? Was his wife along?

A. Yes, sir; Eli's wife was along.

Q. You say you all went to that ball play together, and Eli went along with you?

A. Yes, sir.

Q. Did he go all the way to the ball play with you?

A. Yes, sir.

Q. Who came back with you?

A. Me and him and Wallace Jefferson and Johnnie Jones and his wife and Cornelius Brandy and Mack King and his wife all came back the same evening.

Q. Who stopped at your place?

116 A. Johnnie Jones and his wife and Wallace Jefferson staid all night with me.

Q. Did Eli stop there and eat supper?

A. No, sir; he didn't; he just went on.

Q. Do you know when he did eat supper there?

A. He eat supper there before the ball play.

Q. You mean the evening before?

A. Yes, sir.

Q. Like yesterday evening he would eat supper there; to-morrow was the ball play that he eat supper there?

A. Yes, sir; him and John Ellis eat supper there then.

Q. And you never heard him at any time or place say he had killed anybody?

A. No, sir; I never did. I heard people talk about it, and that is all I heard about it. He never had told me himself, but I heard people talk about it, was all.

Q. Of course we don't want to know what you heard people talk about it. The first ball play up there, did you see him there or not—this at the Seven Devils Prairie?

A. No, sir.

Q. You didn't go there with him?

A. No, sir; I didn't go with him.

Q. You don't remember of seeing him there then?

A. I saw him there, but I didn't go with him.

Q. When were these two ball plays?

A. Along in September, but I don't know what days they were.

Q. They were in September?

A. Yes, sir.

Q. I will ask you if you were at any other ball plays; if you saw him at any other ball plays?

A. I have been at three ball plays——

Q. Now, the other ball play you were at; where was that?

A. Bolin McKinney's; close to Bolin McKinney's.

Q. Close to that prairie?

A. Yes, sir.

Q. Is that the other side or this side of San Bois town?

117 A. This side two miles.

Q. You were at that first ball play there?

A. Yes, sir.

Q. What month was that?

A. In October.

Q. Were you at the second ball play there?

A. No, sir; I wasn't.

Q. Were you at the ball play in November beyond San Bois?

A. No, sir; I wasn't.

Q. Now, at that first ball play on the Bolin Prairie, do you know who came there with the defendant, Eli Lucas, or do you know how he came there?

A. He passes my house, and Johnnie Jones staid at my house right then. Johnnie Jones and his wife and Stephen McGilberry and his wife and a fellow named Fielding James and Willie Chubby went with Eli and Stephen on horseback, riding double.

Q. Who was Eli riding with?

A. Stephen McGilberry; he went on to the ball play.

Q. That was in October, the first one?

A. Yes, sir; it was along in October. I can't say it was the first.

Q. Who did he come back with?

A. I don't know; I can't prove that. I didn't come back with him all the way. He was with Stephen, I guess.

Q. You saw him coming back with him?

A. Yes, sir; I went the other way myself.

Q. Was he riding? I believe you say he was riding with Stephen?

A. Yes, sir; he was riding with him.

Q. Your wife was a witness in this case, wasn't she?

A. Yes, sir.

Q. Do you know why she is not here?

A. She is sick.

Q. Not able to come?

A. No, sir; not able to come.

Q. Simon Johnson was a witness also, wasn't he?

A. Yes, sir.

Q. Do you know his condition?

A. He is bad off, is what I have heard.

Q. Sick?

A. Yes, sir; I never saw him myself, but I heard he was
118 bad off.

Q. They were both here at the last term of court, were they not?

A. Yes, sir.

Q. I believe you say these two ball plays were north of Jerry Fullsom's, on the Seven Devils Prairie? Now, I will ask you what direction San Bois was from Jerry's?

A. About six miles.

Q. I know; but what direction is that from Jerry's?

A. About north—northeast, I guess.

Q. San Bois? What direction is San Bois, where they had the ball plays down there?

A. The first ball play?

Q. No; I mean what direction is that from Jerry's, where they had the ball plays this side of Jerry's?

A. Northwest.

Q. I will ask you if you are not mistaken about that? Those two ball plays, one of which you attended down near San Bois, I will ask you

if that is not southwest? I don't know whether it is or not. Of course I may have it wrong.

A. I know where the ball play is, but I don't know about this north or south.

Q. You don't know the direction, then?

A. No, sir.

Q. Like this is where Jerry lives [indicating], what direction was it from Jerry's? [Witness indicates.]

Q. That would be southwest, would it not?

A. Yes, sir.

Q. You say you were at three ball plays, two on Seven Devils Prairie, near the Iron Bridge?

A. Yes, sir.

Q. That is north of Jerry's?

A. Yes, sir.

Q. And you attended the first one down at San Bois? That is this side of San Bois town?

A. Yes, sir.

Q. You did not attend the second one there?

A. No, sir.

Q. These two ball plays were in October?

A. Yes, sir.

Q. And the first two?

A. In September.

119 Q. Do you know about one before that at Iron Bridge; before these two?

A. No, sir.

Q. Do you know of them having one on Shropshire Prairie?

A. I heard about it, but I was not there.

Q. When was that?

A. That was in August. I wasn't at that.

Q. You are a Choctaw, are you not?

A. Yes, sir.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. What is your name?

A. Isaac King.

Q. Are you any akin to Mack King?

A. Yes, sir.

Q. What akin?

A. My nephew.

Q. Mack King is your nephew, is he?

A. Yes, sir.

Q. You know Eli Lucas, do you?

A. Yes, sir.

Q. Any akin to him?

A. No, sir.

Q. How long have you known him?

A. Well, I have been knowing him ever since he was a little bit of a kid. We were raised together—not raised together, but then I saw him ever since he has been a kid.

Q. How old are you?
A. Twenty-six years old.
Q. Do you know what it is to tell the truth about anything?
A. How is that?
Q. You know what it is to tell the truth about anything, do you?
A. To tell the truth what?
Q. About anything.
A. I am just telling the truth: what I know is all.
Q. Now, tell us what Eli said to you about this killing.
A. He never told me anything about it.
Q. What did he say about it?
A. About it?
120 Q. Yes.
A. I never heard him say anything to me about it at all.
Q. What did he say in your presence to other people about it?
A. I never heard it; only people talking about it is all.
Q. Don't you know you heard him say half a dozen times that he killed that colored man?
A. No, sir; other people talked about it.
Mr. JAMES K. BARNES (of counsel for defendant). You need not tell what other people said.
The ASSISTANT DISTRICT ATTORNEY. I am asking you what the defendant said. Didn't he say in your presence three or four times that he killed that man?
A. No, sir.
Q. Don't you know that he did?
A. No, sir.
Q. Are you sober to-day?
A. Yes, sir.
Q. No, you are not. You are drinking some.
A. I am sober.
Q. You are drinking.
A. I am sober.
Q. How many drinks have you had to-day?
A. One drink.
Q. How long ago was that?
A. A while ago.
Q. How long ago?
A. About two hours ago.
Q. Don't you know you have been drinking ever since you have been here?
A. No, sir.
Q. Don't you know you filled up on whiskey so you could get your courage up to the sticking place to say that you never heard this man admit that he killed that fellow?
A. No, sir; I don't tell lies.
Q. You were drunk nearly all day yesterday, were you not?
A. No, sir.
Q. Were you not staggering around here all day yesterday?
A. No, sir.
(Witness excused.)

121 JOE BROWN, having been duly sworn upon behalf of the defendant, was examined in chief by James K. Barnes, esq., and testified as follows, to wit:

Question. Are you a Choctaw or white man?

Answer. White man.

Q. Do you know John Ellis?

A. Yes, sir.

Q. You say you are a white man?

A. Yes, sir.

Q. You live in the Choctaw Nation?

A. Yes, sir.

Q. Where do you live?

A. I live near Brazile Station.

Q. Were you at any of these ball plays up there last fall in the Choctaw Nation?

A. Yes, sir; I was at one of them.

Q. Which one?

A. One the other side of San Bois.

Q. Which one of those?

A. I think it was the first ball play we had; I am not certain.

Q. Now, I will ask you if you know John Ellis?

A. Yes, sir; I am sorter acquainted with him.

Q. You know the defendant here?

A. I am not personally acquainted with him.

Q. I will ask you if you ever saw him at Jerry Fullsom's?

A. Yes, sir; I believe I seen him once, maybe.

Q. I will ask you if he ever told you there or any other place that he killed anybody?

A. No, sir; he did not.

Q. Did you ever hear him say to any person that he had killed anybody?

A. No, sir.

Q. Did you ever hear him tell John Ellis that, or anybody else?

A. No, sir.

The ASSISTANT DISTRICT ATTORNEY. John Ellis never said that this man was present.

122 Mr. JAMES K. BARNES (of counsel for defendant). I will read what he said before the commissioner at the proper time.

(Cross-examination waived. Witness excused.)

123 HOUSTON NELSON, having been duly sworn upon behalf of the defendant, was examined in chief by James K. Barnes, esq., through Interpreter Morris, and testified as follows, to wit:

Question. Ask him if he knows John Jones, a witness here in this case.

Answer. Yes, sir.

Q. Ask him if Eli Lucas ever told him that he killed anybody, in the presence of John Jones or anybody else.

A. No, sir; he never told him that he killed anybody.

Q. Ask him if he knows Henry Gains?

A. No, sir; he says he don't know him.

The ASSISTANT DISTRICT ATTORNEY. Have you a witness here named Joe Burns?

Mr. JAMES K. BARNES (of counsel for defendant). Yes, sir; there is a witness here named Joe Burns.

(Witness excused.)

124 *Testimony of John Jones before commissioner.*

Mr. JAMES K. BARNES (of counsel for defendant). I now want to read the examination of John Jones, as taken before the commissioner.

The ASSISTANT DISTRICT ATTORNEY. Who took that examination?

Mr. JAMES K. BARNES (of counsel for defendant). Commissioner Brizzolara.

The ASSISTANT DISTRICT ATTORNEY. What stenographer?

Mr. J. K. BARNES (of counsel for defendant). Mr. Du Bois.

The ASSISTANT DISTRICT ATTORNEY. Go ahead. I will not object to the introduction of it.

Whereupon the testimony of the said witness John Jones, as taken before Commissioner Brizzolara, was read in evidence to the jury, the same being as follows, to wit:

JOHN JONES, having been duly sworn upon behalf of the Government, was examined by Commissioner Brizzolara, and testified as follows, to wit:

Question. What is your name?
Answer. John Jones.
Q. What is your post-office?
A. Panther, I. T.
Q. Do you know the defendant, Eli Lucas?
A. Yes, sir; I know him.
Q. Did you know the deceased, Levi Kemp, in his lifetime?
A. No, sir.
Q. Did you ever see him?
A. No, sir.
Q. Eli Lucas is charged with killing Kemp; what do you know about it?
A. We had a ball play down there, and when we come back he
125 didn't come right back with us, and when he come in he said he had killed a nigger back there.
Q. Did he say what he killed him for?
A. He said he killed him just to see him jump. He said the first time he shot him he jumped away up, and when he shot him again he fell back over between some logs, and that some blood flew up on him; then he rode over to Hannah Sockey's.
Q. When was it that this happened?
A. I could not say just exactly; it was somewhere in October.
Q. This year?
A. Yes, sir.
Q. Did you ever find any body down there?
A. No, sir.
Q. Did you ever go down to his body?

A. I seen the head. I seen it at Jerry Fullsom's.
Q. How did the head come down there?
A. There was a crowd started out to find the body and they brought it down there.
Q. You were not with that crowd?
A. No, sir.
Q. Did he tell anyone else about it?
A. He told Henry Gaines about it, and he told Houston Nelson about it.
Q. Were you present?
A. Yes, sir.
Q. Where was it at?
A. At Jerry Fullsom's house.
Q. What did he say?
A. He said he had killed a nigger; that he killed him just to see him jump.

Cross-examination by JAMES K. BARNES, Esq.:

Q. You say this was in October?
A. Yes, sir; I don't know just exactly.
Q. Has this Eli Lucas got good sense?
A. Yes.
Q. Was this man drunk?
A. No, sir.
Q. When did you see this man's head?
A. I could not tell you; sometime last month (meaning November).
(Witness excused.)

126 *Testimony of John Ellis before commissioner.*

MR. JAMES K. BARNES (of counsel for defendant). I also offer at this time the testimony of John Ellis as taken before Commissioner Brizzolara.

There was no objection, and the same was read to the jury, being as follows, to wit:

JOHN ELLIS, having been duly sworn upon behalf of the Government, was examined by Commissioner Brizzolara, and testified as follows, to wit:

Question. What is your name?
Answer. John Ellis.
Q. What is your post-office?
A. Panther, I. T.
Q. Do you know the defendant?
A. Yes, sir.
Q. Did you know Levi Kemp?
A. No, sir.
Q. Did you ever see him?
A. Yes, sir; I saw him on the prairie one day. I did not know his name.
Q. Who was with him?
A. He was by himself.

Q. This man Lucas is charged with killing him. What do you know about it?

A. All I know about it is one night we was at Jerry Fullsom's house and he was drunk, and he told me that he had killed that nigger. He asked me if I didn't believe him and I told him I didn't, and he says, "You will see." I never asked him much about it, as he was drunk.

Q. What did he tell you about it?

A. He just told me he had killed him.

Q. Did he say why and how he shot him?

A. He said he shot him, and the first time he shot him he jumped away up and whooped.

Q. Did he tell you why he shot him?

A. He said that there was an old nigger woman lived over
127 there, and he would come over there and beg for something to eat, and she was tired of him coming there and told him to shoot him.

Q. Did he tell you who that was—that old woman?

A. Yes, sir; he said it was Hannah Soekey.

Q. Did he tell you what he shot him with?

A. Yes, sir; he said he shot him with a pistol.

Q. Did he say what he did after he shot him?

A. No, sir.

Q. Who was present when he told you this?

A. There wasn't anyone present. A few minutes after that Joe Brown walked in the room and he told him.

Q. Was you present when he told Joe Brown?

A. No, sir.

Q. When did he tell you this?

A. It was about the middle of October.

(Witness excused.)

128 *Testimony of Mack King before commissioner.*

Mr. JAMES K. BARNES (of counsel for defendant). And also I desire to offer at this time the testimony of Mack King, as taken before Commissioner Brizzolara.

There was no objection, and the same was read to the jury, being as follows, to wit:

MACK KING, having been duly sworn upon behalf of the Government, was examined by Commissioner Brizzolara and testified as follows, to wit:

Question. What is your name?

Answer. Mack King.

Q. What is your post-office?

A. Panther, I. T.

Q. Do you know this man?

A. Yes, sir.

Q. Did you know Levi Kemp?

A. I saw him once.

Q. Tell him this man Lucas is charged with killing Kemp, and tell him to tell us all about it.

A. He says that this man told him that he had killed that crazy nigger.

Q. Ask him if he told him how he come to kill him.

A. He said he told him he went to where the nigger was camping and shot him.

Q. Ask him if he told him what he done with the body.

A. He says he just told him that he killed him, and he didn't say what he done with the body.

Q. Ask him if he told him what he shot him with.

A. He says a pistol.

Q. Ask him when it was that this man told him this.

A. He says it was somewhere in October, he thinks.

Q. Where was it at?

A. Jerry Fullsom's.

129 Q. Ask him if he told him whether it was in the day time or night?

A. He says it was about this time in the day (about 10:30).

Q. Ask him who was with him.

A. Cornelius Brandy.

Q. Ask him how this man happened to tell him about it.

A. He says he just come and told him.

Q. How long after this man told him this was it until he found the body?

A. He says they found the body about the 12th of this month.

Q. Tell him to tell us all about finding the body.

A. He says they found a lot of bones there and the arms was all gone off.

Q. Where were the bones at?

A. He says they were just scattered around there. He says it seemed like something had eat it.

Q. Ask him if the skull was lying around there.

A. He says the skull was lying off from the body.

Q. Ask him if there was any clothing there.

A. He says there was a piece of shirt there and some pants there.

Q. Hat?

A. No, sir.

Q. What was done with the bones?

A. He says they piled them up and covered them up like with some rock.

Q. Who was with him?

A. Will Stobley, Jonas Thompson, Jerry Fullsom, Size Sexton, Wallaw Webster, Bill Hankins, and Mathey Henry.

Q. He was along?

A. Yes, sir.

Q. Ask him where this party had started from.

A. From Jerry Fullsom's.

Q. Ask him how they come to go together.

A. He says they gather up to go to hunt for the dead body.

Q. Where was the defendant at this time?

A. He had moved to San Bois.

Q. Ask him if this is the skull [handing skull to interpreter].

A. Yes, sir; he says that is the skull.

130 Q. You say this may [man] was at San Bois at that time?
A. Yes, sir.
Q. How far was that from there?
A. 14 miles.
Q. How far from Jerry Fullsom's to where the bones were found?
A. About two miles.
Q. Ask him what they done with the shirt.
A. He says they covered the bones with it.

The witness was afterwards recalled by the commissioner and asked the following questions:

Q. Ask him if he ever saw this defendant at any time with Levi Kemp.
A. He says he never did.
Q. Ask him if he ever was with Kemp.
A. He says he never was with him; he just met him.
(Witness excused.)

131 *Testimony of John Le Flore before commissioner.*

Mr. JAMES K. BARNES (of counsel for defendant). Also I desire to offer at this time the testimony of the witness John Le Flore as given before Commissioner Brizzolara.

There was no objection, and the same was read to the jury, being as follows, to wit:

JOHN LE FLORE, having been duly sworn upon behalf of the Government, was examined by Commissioner Brizzolara and testified as follows, to wit:

Question. What is your name?
Answer. John Le Flore.
Q. What is your post-office?
A. Panther, I. T.
Q. Do you know the defendant in this cause, Eli Lucas?
A. Yes, sir.
Q. How far do you live from this man?
A. He lives at San Bois town; I guess it is about 12 or 14 miles from where I live.
Q. The defendant is charged with killing an unknown colored man. What do you know about it?
A. My neighbors told me——
Q. Not what your neighbors told you. What I want to know is what you know of your own knowledge.
A. Me and Holbrook went out in the woods and found some bones.
Q. When was this?
A. I guess it must have been last Thursday. I think it wast last Thursday. We found a dead body of this darky. I identified the pants. It was a pair that I had given him.
Q. How come you to look for the body?
A. We had heard that there was some bones out there; I think
132 Jonas Thompson told about them being there.
Q. Where did you start to look for the body from?

A. We started from my house.

Q. Who was with you?

A. Holbrook.

Q. What time in the day?

A. I guess it was about two or three o'clock in the afternoon.

Q. Where did you go to look for it?

A. We went south to Hannah Sokey's, and asked her if she knew where the body was, and she said it was back over the hill, and then we turned and come back over the hill and found it. When we got there we found some bones piled up there with some rocks over them, and I knew the pants. He had chored around for me and I had given him the pants along in September, and that is about all I know about it. We found the bones there and the skull was there and there was some pieces of a shirt.

Q. Where did you find the skull?

A. It was lying off a little ways from the pile of bones.

Q. What did you do with the bones?

A. We brought the skull along, and the rest of the bones are still there. I brought some hairs along besides the skull.

Q. What was the name of this man?

A. Kemp.

Q. Where did he come from?

A. He said he come from down in by Little Rock. That is all I know.

Q. How long did he leave your place before the bones were found?

A. I think he left my place about the last of September.

Q. How come him to leave your place?

A. I told him I did not need him any more.

Q. After he left your house did you hear of him any more?

A. Yes, sir; an old Choctaw saw him. I heard of him for two or three days after that.

133 Q. Do you know how this man was killed?

A. No, sir.

Q. You say you brought the skull along. Is it here?

A. Yes, sir; it is here. (Here the skull and hair is introduced in evidence.)

Q. Did that defendant ever say anything to you about the killing of this man Kemp?

A. No, sir.

Q. Was there anything else around where you found this skull and bones?

A. I never noticed anything else; there was a kind of a clean place there where he had been laying, it looked like.

Cross-examination by J. K. BARNES, Esq.:

Q. How long has it been since you gave him the pants?

A. It was along in September.

Q. Did you find any holes in the clothing?

A. No, sir; there was some holes there, but I could not tell what caused them.

Q. When did you see this darky last?

A. I think it was along in September.

Q. You are a Choctaw?
A. Yes, sir.
Q. How far do you live from here?
A. About 45 miles. I live in San Bois County.
Q. Was this nigger a Choctaw, the one that was killed?
A. I suppose not. I asked him if he knew any darkies around there, and he said he didn't. I asked him where he come from, and he said he come from Little Rock.
Q. You don't know anything about him yourself?
A. No, sir.
Q. When did he come to your place?
A. It was along about the first of September. He staid with me two or three weeks.
(Witness excused.)

134 *Testimony of Noah Holbrook before commissioner.*

Mr. JAMES K. BARNES (of counsel for defendant). I also offer at this time the testimony of Noah Holbrook as taken before Commissioner Brizzolara.

There was no objection, and the same was read in evidence to the jury, being as follows, to wit:

NOAH W. HOLBROOK, having been duly sworn upon behalf of the Government, was examined by Commissioner Brizzolara, and testified as follows, to wit:

Question. What is your post-office?
Answer. Panther, I. T.
Q. Did you know Levi Kemp?
A. No, sir; I met him a few times.
Q. Do you know the defendant?
A. Yes, sir.
Q. When did you see Kemp last?
A. I don't remember just when. I think it was over there in Panther the last I saw of him.
Q. Do you know where he went to?
A. No, sir.
Q. What month was it?
A. I think it was in August or September.
Q. Did you know where he was going?
A. No, sir.
Q. Where did you get acquainted with him at? You just knew him when you saw him?
A. Yes, sir.
Q. Where was he staying?
A. At Mr. Le Flore's.
Q. You were with Mr. Le Flore when you went to the bones?
A. Yes, sir.
Q. Did you ever hear Lucas talk about killing this man?
A. No, sir.
Q. Do you know anything else about it?
A. No, sir.
(Witness excused.)

135 JOHN JONES, being recalled by the defendant for further cross-examination, was reexamined by James K. Barnes, esq., and testified as follows, to wit:

Question. I believe you say Eli told you that at Isaac King's, in the presence of Isaac King?

Answer. Yes, sir.

Q. Was Eli drunk or sober?

A. He was drinking.

Q. He was drinking, was he?

A. Yes, sir.

Q. He told you that at the table?

A. Yes, sir.

Q. In the presence of Isaac King?

A. Yes, sir; down at Isaac's table.

Q. At Isaac's stable?

A. Yes, sir.

Q. You said at the table?

A. We were all eating supper.

Q. You say it was at the table?

A. Yes, sir.

Q. Isaac King was there and heard it?

A. Yes, sir.

Q. And he told you and Isaac King?

A. Yes, sir; and my wife and sister, Mollie King, and me and Isaac.

Q. And you say he told you and Mack King over at Jerry Fullsom's?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. You have gone over that three or four times.

Mr. JAMES K. BARNES (of counsel for defendant). I just wanted to understand that.

(Witness excused.)

136 WALLACE JEFFERSON, having been duly sworn upon behalf of the defendant, was examined in chief by James K. Barnes, esq., through Interpreter Morris, and testified as follows, to wit:

Question. Ask him if he is a Choctaw.

Answer. Yes, sir; he says he is.

Q. Where does he live?

A. Red Oak.

Q. Choctaw Nation?

A. Yes, sir.

Q. Ask him where he was living last fall.

A. He said he was living at Red Oak.

Q. Ask him if he was at any of the ball plays up there in the Choctaw Nation.

A. He said he was at one of the ball plays.

Q. Ask him which one.

A. He said they were playing at Panther, close to Iron Bridge, the one he was at.

Q. Does he say Panther or the prairie there?

A. He says Panther, close to Iron Bridge.

Q. Ask him if it wasn't on what was called the Seven Devils Prairie.

A. He says they called it some names; he can't call it.

Q. Ask him who did he go to the ball play with.

A. He said he went by himself.

Q. Ask him who did he come back with.

A. He said he was by himself until he got to Isaac King's, when he was on his way to the ball play, and after he got to Isaac King's he got with a gang over there.

Q. Tell him that is what I want him to tell, who he got with at Isaac King's and who he went from there with to the ball play.

A. Eli, Cornelius Brandy, and Joe Burns, and Eli's wife and Mack King's wife. Those two ladies were along.

Q. Ask him if John Jones and his wife were along.

A. Yes, sir; he said John Jones and his wife were along.

137 Q. Eli and his wife?

A. Yes, sir.

Q. And Mack King and his wife?

A. Yes, sir.

Q. Ask him if Isaac King was along.

A. He said she didn't go.

Q. I asked if Isaac King himself was along.

A. Yes, sir; Isaac King was along.

Q. Now ask him who came back together.

A. He said he came back along about with the same gang he went there with.

Q. Ask him if Eli came back with him.

A. He said they all came together. He said Eli was along with them, and they all came together to Isaac King's there, and Eli and his wife went on to Jerry Fullsom's from there; Mack King and his wife, and Eli and his wife.

Q. Ask him if Mack didn't live over at Jerry's at that time.

A. Yes, sir; he lives there at Jerry's.

Q. Mack King and his wife and Eli and his wife went over to Jerry's?

A. Yes, sir.

Q. Ask him if that wasn't about a quarter and a half a quarter or half a mile from Isaac King's.

A. He says he supposes it was something near a mile. He would suppose it was, he said.

Q. Ask him where did he stop.

A. He stopped at Isaac's house.

Q. Ask him who else stopped there.

A. John Jones and Cornelius Brandy.

Q. Ask him if John Jones's wife stopped there, too.

A. Yes, sir; John Jones's wife stopped there, too.

Q. Eli and his wife and Mack and his wife went on; they didn't stop then; they went on to Jerry Fullsom's.

A. Yes, sir; he said they just stopped and got a drink of water and went on to Jerry Fullsom's.

Q. Ask him if he was to any of the other ball plays.

A. No, sir; he wasn't at any other ball plays.

Q. Ask him what month that was.

A. In September.

(Cross-examination waived. Witness excused.)

138 HOLLIS JAMES, having been duly sworn, was examined in chief by James K. Barnes, esq., through Interpreter Morris, and testified as follows, to wit:

Question. Ask him where does he live.

Answer. San Bois, he says.

Q. Ask him if he is a Choctaw.

A. Yes, sir; he is.

Q. Ask him if he knows Eli Lucas, the defendant.

A. Yes, sir; he says he knows him.

Q. How long has he known him?

A. He says he has been knowing ever since he was a little child.

Q. Was he at any of the ball plays up there last fall?

The ASSISTANT DISTRICT ATTORNEY. Was who? This witness or the defendant?

Mr. JAMES K. BARNES (of counsel for defendant). The witness.

A. Yes, sir; he says he was.

Q. Ask him how many ball plays he was at.

A. He says he thinks about five.

Q. Ask him what ball plays he was at.

A. Iron Bridge.

Q. How many did they have at the Iron Bridge.

A. He said he only went to one game there, and that was the second game that they had.

Q. Ask him if he saw Eli Lucas there, the defendant.

A. Yes, sir; he said he was there.

Q. Now ask him if he was at any of the ball plays down at San Bois, this side of San Bois, and some the other side of San Bois.

A. He was; when they played a game close to Bolin McKinney's he was there.

Q. Ask him if he saw the defendant there.

A. Yes, sir; he said he saw him there.

139 Q. Ask him if he knows how many they played on Bolin McKinney Prairie.

A. Played twice there, he says.

Q. And he was at one of them. Ask him which one he was at.

A. He said he was at both games they played there at Bolin Prairie.

Q. And he was at the second one they played at Iron Bridge?

A. Yes, sir.

Q. Ask him when was that—that is, the second one at the Iron Bridge.

A. He says he thinks it was along in September.

Q. When was the two on Bolin McKinney Prairie?

A. Along about the first of October.

Q. Ask him if he was at the one beyond San Bois, the other side of San Bois town.

A. Yes, sir; he said he was there.

Q. Now ask him when that was, the last one—the one beyond San Bois town?

A. That was in November, he says.

Q. Now ask him if he saw Eli Lucas at any of these ball plays over there at San Bois or this side of San Bois town.

A. Yes, sir; he said he seen him there.

Q. Ask him if he knows how he came there to the first one; if he knows anything about that; if he knows how he came to any of these ball plays, and if he does, to tell it.

A. He said when he was at the game that played beyond San Bois town there Eli Lucas was in a wagon—had a wagon along.

Q. Ask him who was along with him, if he remembers.

A. Johnnie Jones' wife and a woman by the name of Betsy, he says.

Q. Betsy who?

A. Betsy Nail.

Q. Johnnie Jones and wife, or Johnnie Jones' wife?

A. Johnnie Jones' wife.

Q. And Betsy Nail?

A. Yes, sir.

Q. And Eli?

A. Yes, sir; and Eli's wife.

Q. They were there in a wagon?

A. Yes, sir.

140 Q. They were there. Ask him if he saw him come there in the wagon—that is, in November.

A. He said he met them at San Bois town as they were going; he met them there, and they all went together up to the ball ground.

Q. Ask him if they came away together.

A. He said they all went together to his house.

Q. Ask him if anybody staid at his house.

A. He said yes; the women that were in the wagon staid at his house there that night.

Q. Did Eli stay there, too?

A. Yes, sir; he said Eli staid there at his house.

Q. That was the night he came from the ball play in November?

A. Yes, sir.

Q. Ask him if he saw him at the ball play this side of San Bois town.

A. Yes, sir; he said he seen him there.

Q. Ask him if he knows how he came to any of those ball plays.

A. He said he went there with Stephen McGillberry on horseback, riding behind him.

Q. One of those he came there riding behind Stephen McGilberry?

A. Yes, sir.

Q. Ask him if he knows how he went away from the ball play.

A. He said he went away behind Stephen McGilberry, riding behind him. He said that was the first of October.

Q. Ask him if that was the first ball play down there this side of San Bois.

A. Yes, sir; that was the first ball play they had there at that prairie.

Q. Now, the second ball play down there this side of SanBois town—ask him if he knows how he came there at that ball play.

A. He said he came in a wagon.

141 Q. Ask him if he knows whose wagon that was.

A. He said he had Dickson Billie's.

Q. Does he mean the last ball play—the one the other side of San Bois town, or the one this side of San Bois town?

A. That was the second game that they played, the other side of San Bois town, that he went in Dickson Billie's wagon.

Q. Ask him how many times he saw him at these ball plays in the wagon.

A. He said he seen him in a wagon twice—in the second game, this side of San Bois town, in a wagon an' in a wagon up above San Bois town.

Q. Then he saw him twice in a wagon—once this side and once the other side of San Bois town?

A. Yes, sir.

(Cross-examination waived. Witness excused.)

142 BETSY NAIL, having been duly sworn upon behalf of the defendant, was examined in chief by James K. Barnes, esq., through Interpreter Morris, and testified as follows, to wit:

Question. Ask this woman her name.

Answer. Betsy Nail, she says.

Q. Ask her where does she live.

A. She says she lives at San Bois town.

Q. Ask her if she is a Choctaw.

A. Yes, sir; she says she is a Choctaw.

Q. Ask her if she knows Jerry Fullsom.

A. Yes, sir; she says she knows him.

Q. Ask her if she heard about a lot of ball plays up there last fall.

A. Yes, sir; she said she heard of the games that they had, and saw people going to them.

Q. Ask her where she lived at that time.

A. She said she was living at Jerry Fullsom's then. Jerry Fullsom had hired her to cook for him, and she was working for Jerry Fullsom.

Q. Did she attend any of the ball plays?

A. She said she did not go to but one game, and that was the last game they had.

Q. Where did they have that game?

A. That was close to where she was living at, about a mile from where she lived at.

Q. It was more than a mile from Jerry Fullsom's, wasn't it?

A. She said it was further than a mile from Jerry Fullsom's, but it is just about a mile from where she is living now.

Q. Who did she go there with, and how did she go there?

A. She said she went in a wagon. Eli had a wagon, and her and Eli's wife, and Johnnie Jones and his wife, and they went in a wagon up there.

Q. Where was the ball play, if it was this side or the other side
143 of San Bois town?

A. She said it was the other side of San Bois town.

Q. Wasn't that the last ball play?

A. Yes, sir; she says that was the last ball play.

Q. Who came back with her?

A. She said she came back with the same crowd she went with.

Q. Did they stay anywhere the night they came from the ball play?

A. She said they staid at Hollis Jameses. She said it commenced raining and he told them they had better come and stay all night at his house, and wait until the next day and go home, and they staid there.

Q. They staid there all night?
A. Yes, sir.
Q. Now, she has stated she worked for Jerry Fullsom. How long has she worked there?
A. She says she don't know just exactly how long, but she says she thinks she staid just about two months.
Q. Ask him if she ever heard of Eli Lucas killing anybody around Jerry's there?
A. She said no, sir; she had never heard him say anything about killing anybody.
(Cross-examination waived. Witness excused.)

144 CHARLES WADE, having been duly sworn upon behalf of the defendant, was examined in chief by James K. Barnes, esq., through Interpreter Morris, and testified as follows, to wit:

Question. Ask this witness his name.
Answer. Charles Wade.
Q. Are you a Chocataw?
A. Yes, sir, he says.
Q. Ask him how long he has been a Choctaw.
A. He says he don't know.
Q. He can't remember that far back?
A. No, sir.
Q. How old is he?
A. He says he is about 22.
Q. Are you married?
A. No, sir; he is not married, he says.
Q. Ask him where he lives.
A. He said he lives there at San Bois town.
Q. How long has he lived there?
A. About ten years, he says, he guesses.
Q. Did he attend any of the ball plays last fall up there in that country?
A. Yes, sir; he said he was to the games.
Q. Which ball plays did he attend?
A. He said when they had a game there, close to the Iron Bridge there, he was there.
Q. Which one of the ball plays was that that they had near the Iron Bridge that he attended?
A. The second game that they had near the Iron Bridge.
Q. Did he see Eli Lucas there?
A. Yes, sir; he said he seen him there.
Q. Does he know who he come with, or not?
A. No, sir; he says he don't know who he come with.
Q. Ask him if he attended the ball plays down this side of San Bois town.

145 A. Yes, sir; he said he was there.
Q. Which one?
A. He was at the first game, he says.
Q. Did he see Eli there?
A. Yes, sir; he said he was there.

Q. Does he know who he came there with, or does he know anything about it?

A. He said he seen him come on a horse with Stephen when he saw him.

Q. Stephen who?

A. Stephen McGilberry, he says.

Q. That was the first ball play down there this side of San Bois?

A. Yes, sir.

Q. Ask him if he saw him coming away from there?

A. No, sir; he said he didn't see him going away.

Q. Was he at any of the other ball plays?

A. He was at the second game there, and he was at the game beyond San Bois town, too.

Q. Did he see Eli there?

A. Yes, sir; he said he seen him there.

Q. Does he know how he come to any of those plays?

A. He said he came in a wagon up there.

Q. Which one, or both of them?

A. He saw him in a wagon when he came there—the second game there this side of San Bois town.

Q. Saw him there in a wagon?

A. Yes, sir.

Q. Did he see him go away from there?

A. No, sir; he said he did not see him go away.

Q. Ask him if he saw him at the one the other side of San Bois town in a wagon.

A. Yes, sir; he said he saw him there.

Q. Come there in a wagon, ask him.

A. Yes, sir; he was in a wagon.

Q. Did he see him go away, or does he know anything about that?

A. Yes, sir; he said he saw him go away; he saw him the next day after they left Hollis James's house.

Q. In a wagon?

A. Yes, sir.

Q. Ask him who was with him.

146 A. He said Betsy Nail and Eli and his wife.

Q. Johnnie Jones' wife?

A. He says he does not remember; she may have been along. He does not remember.

Q. That is all he knows about it?

A. Yes, sir; that is all he knows about it.

(Cross-examination waived. Witness excused.)

147 JOSHUA LUCAS, having been duly sworn upon behalf of the defendant, was examined in chief by James K. Barnes, esq., through Interpreter Morris, and testified as follows, to wit:

Question. Ask him his name.

Answer. Joshua Lucas, he says.

Q. Where does he live?

A. San Bois, Iron Bridge.

Q. Choctaw Nation?

A. Yes, sir; at the Iron Bridge.

Q. Ask him if he saw Eli at any of the ball plays.

A. Yes, sir; he said he seen him there.

Q. Ask him if he knows how he come to any of them—if he knows anything about them.

A. He said he seen him come in a wagon is the only way he ever saw him.

Q. Which one was that?

A. Close to Bolin's house there, this side of San Bois town.

Q. He saw him there?

A. Yes, sir; that is where he saw him in a wagon.

Q. Ask him if he knows how he went away.

A. He said after the game was over he seen him hitch up his horse. He never seen how he left, but they were having a little horse race off a piece from there, and he don't know hoc he left there, as he went off to the horse race, but he saw him hitch up his horses to the wagon.

Q. Ask if he saw him at the ball play beyond San Bois—if he was there.

A. Yes, sir; he saw him at the game beyond San Bois town.

Q. Ask him if he knows how he came there that time.

A. He says he don't know exactly how he came there, but he just only heard them say that he came in a wagon is all he knows about it.

Q. Ask him if he didn't see Betsy Nail at the last ball play.

A. Yes, sir; he said he seen her there at the last ball game they had.

(Cross-examination waived. Witness excused.)

148 TECUMSEH WHISTLER, having been duly sworn upon behalf of the defendant, was examined in chief by James K. Barnes, esq., through Interpreter Morris, and testified as follows, to wit:

Question. Ask him where does he live.

Answer. San Bois town, he says.

Q. Choctaw Nation?

A. Yes, sir.

Q. Is he a Choctaw?

A. Yes, sir; he says.

Q. Ask him if he knows Eli Lucas, the defendant.

A. Yes, sir; he says he knows him.

Q. Ask him if they had any ball plays up there in that country last fall.

A. He said they played ball around there a good deal, but he never went to but one game they had there, and that was along in November; was the only game that he went to during the season.

Q. Ask him if he saw the defendant, Eli Lucas, there.

The ASSISTANT DISTRICT ATTORNEY. At the November game?

Mr. JAMES K. BARNES (of counsel for defendant). Yes, sir.

The INTERPRETER. Yes, sir; he said he saw him there.

Q. Now ask him if he knows how he came there, and who he came with.

A. He said he went there the day the game was played, and he just seen him there, and he don't know how he got there, any way he got there.

Q. Ask him if he saw Betsy Nail there that day.

A. Yes, sir; he said he seen her there.

Q. Ask him if he knows how he went away, or anything about that.

A. He said after the game was over he seen Eli and Betsy Nail and some more women all in a wagon together going away from the game; there came up a rain, and they were going in the direction of Hollis Jameses.

Q. And he only attended one ball play?

A. Yes, sir.

149 Q. Does he know Henry Gaines?

A. No, sir; he says he don't know him.

(Cross-examination waived. Witness excused.)

Whereupon, the hour of adjournment having arrived, court was adjourned until Monday morning, June 10th, A. D. 1895.

150 MONDAY MORNING, *June 10th, A. D. 1895*—9.00 o'clock.

Court met pursuant to adjournment, when the following among other proceedings were had, to wit:

HANNAH SOCKEY, being recalled by the defendant, was further examined by James K. Barnes, esq., through Interpreter Morris, and testified as follows, to wit:

Question. Ask her if she told Eli that this colored man came over there to get something to eat, and she told him to kill him.

Answer. She says, no, sir; she didn't tell him that.

Q. She never told him that at all?

A. That is what she says.

Q. Ask her if she ever told you anything about this colored man.

A. She said she told Eli that she had heard he was camping somewheres; she says that is all. She hadn't seen him; she just told what she had heard.

Q. Ask her how come her to tell him that.

A. She says that Eli and Jim Brandy were staying there, and she just only spoke and said she heard there was a colored man camped over the ridge there somewheres, was all the remarks she made about it.

Q. Ask her if she told anybody to kill him.

A. No, sir; she says she never did tell anybody to kill him.

Q. She never did go to his camp or anything of that kind?

A. No, sir; she never had been there.

(Witness excused.)

151 ELI LUCAS, the defendant, having been duly sworn in his own behalf, was examined in chief by James K. Barnes, esq., and testified as follows, to wit:

Question. You are charged here with killing a colored man up there by the name of Kemp. I will ask you if you ever told anybody you killed that man?

Answer. No, sir.

Q. You never did?

A. No, sir; I never did.

Q. Do you know Jerry Fullsom?

A. Yes, sir.

Q. I will ask you if you ever told him?

A. No, sir.

Q. What was the name of your uncle that was killed up there at Fullsom's store?

A. Wilson Hukaloche.

Q. You say he was your uncle?

A. Yes, sir.

Q. Were you there when he was killed?

The ASSISTANT DISTRICT ATTORNEY. I do not see the object of going into the killing of the uncle.

The COURT. No.

Mr. JAMES K. BARNES (of counsel for defendant). I want to prove that he went there and got his uncle.

The COURT. Suppose he did, what of it?

The ASSISTANT DISTRICT ATTORNEY. I do not see the connection that has to do with this killing.

Mr. JAMES K. BARNES (of counsel for defendant). I want to show, if your honor please, that it was currently reported there that this man Jerry Fullsom killed this defendant's uncle.

The COURT. Do you claim, as a lawyer, that you can prove a fact in that way—that it is currently reported? What sort of protection
152 would there be for character or anything else if that was the rule? You can hear anything currently reported.

Mr. JAMES K. BARNES (of counsel for defendant). I can prove that he went there and got him at the store.

The COURT. That does not amount to anything. Fullsom himself says he was killed at the store, and that is the end of it. The fact of this witness going there and getting him amounts to nothing one way or the other. You can not prove by current report, of course, that anybody killed him.

Mr. JAMES K. BARNES (of counsel for defendant). I believe I will save an exception; I don't know. (To the witness.) You know Mack King?

A. Yes, sir.

Q. I will ask you whose daughter he married.

A. Jerry Fullsom's daughter. He bought her with whiskey from Jerry.

Q. Jerry is his father-in-law?

A. Yes, sir.

Q. Did you ever tell Mack King that you killed that man?

A. No, sir.

Q. Did you ever see that man?

A. No, sir; I never did see him. I was raised right there.

Q. Do you know John Ellis?

A. Yes, sir; I know him.

Q. Did you ever tell John Ellis?

A. No, sir; I never did tell him.

Q. How are you and John Ellis about being friendly?

A. John Ellis got mad about a woman. I beat him out of the girl that I married.

Q. John was courting her, was he?

A. Yes, sir.

Q. Did you ever tell Stephen McGilberry that you had killed anybody?

A. No, sir; I never did tell anybody. I never did kill nobody myself.

Q. Do you know this John Jones?

153 A. Yes, sir; I knew him a good while ago.

Q. Did you ever tell him you killed that man?

A. No, sir; I never did.

Q. Were you at those ball plays up there?

A. Yes, sir; I was, in September, at the Iron Bridge; the first of September, at the ball play.

Q. Who did you go there with?

A. I went with Stephen McGilberry and Jim Brandy. Me and Jim Brandy came to Stephen's house, and Stephen wasn't there. He was out hunting horses, and we waited for Stephen, and Stephen brought the horses, and we went and catched up with Silas Ward and Simon.

Q. Did you come back a piece of the way with anybody? Who did you come back with a part of the way?

A. Yes, sir; I came part way from the ball play.

Q. With who?

A. With Isaac King——

Q. Do you mean the first ball play?

A. I come with Silas Ward. I left the crowd and come with Silas Ward.

Q. You came with Silas a part of the way?

A. Yes, sir; and close to John Le Flore's house, about a quarter from there, and on top of the ridge one road goes to Milton Post-Office and another road goes to Dickson Billie's, and I went that road. I stopped at Stephen McGilberry's house and I eat supper there.

Q. Did Lina Sockey tell you anything about any colored man?

A. No, sir.

Q. Did she ask you to kill any colored man?

A. No, sir.

Q. That he was bothering her?

A. No, sir.

Q. Did you ever tell John Ellis any such stuff as that?

A. No, sir; I never did tell that.

Q. You say you came there and eat supper there. Where did you go from there?

A. I went to Dickson Billie's.

Q. Why did you go there?

A. I went after a wagon.

154 Q. What were you going to do with the wagon?

A. My wife got some things down at San Bois, and she wanted me to get those things to move to Jerry Fullsom's, and I went to get the wagon. I went home about dark to Jerry's house, and the next morning——

Q. You mean the next day?

A. Yes, sir; and Betsy Nail was with me to go to San Bois, and my wife, and we went to Hollis James's house to get dinner. That is where we got dinner.

Q. That is when you went for your things up there?
A. Yes, sir.
Q. Did you go to the second ball play up near the Iron Bridge?
A. Yes, sir.
Q. Who did you go there with that day?
A. Isaac King.
Q. Who else?
A. My wife, and Wallace Jefferson, and Mack King and his wife, and Anderson Waley.
Q. Was John Jones along?
A. John Jones and John Ellis?
Q. Was Jones's wife along?
A. Yes, sir.
Q. You went with them?
A. Yes, sir.
Q. How did you come back?
A. I came back with those same boys. I stopped at Isaac King's house, and we drank some water up there, and went on to Jerry's house.
Q. Where did you go from there—from Isaac King's house?
A. I went to Jerry's.
Q. Who was with you?
A. Mack King, his wife, and my wife.
Q. Did you eat supper there that night?
A. No, sir.
Q. You didn't eat any supper there that night?
A. No, sir.
Q. Were you at the ball plays this side of San Bois, Bolin McKinney Prairie?
A. Yes, sir.
Q. The first ball play—how did you go there?
A. The first ball play I ride behind Stephen McGilberry's horse.
Q. You rode behind him?
155 A. Yes, sir; and coming back, too. He left me at Jerry Fullsom's house.
Q. The second play—how did you go up there?
A. I went in a wagon.
Q. Whose wagon?
A. Stephen McGilberry's wagon. Stephen's wife and my wife and Johnnie Jones's wife.
Q. This Lina Sockey was his wife, or at least he was living with her?
A. Yes, sir; at that time Stephen was living with her.
Q. He wasn't married to her, though?
A. No, sir. Stephen is a Choctaw and that woman is a colored woman, and they can't marry.
Q. Was you at the ball play the other side of San Bois?
A. Yes, sir.
Q. When was those two ball plays this side of San Bois?
A. October.
Q. When was the two ball plays near the Iron Bridge?
A. September.
Q. The one you went to the other side of San Bois, when was that?

A. October and November.

Q. The last one, I mean.

A. The last one was in November, I think.

Q. Who went with you to that ball play—the last one?

A. Betsy Nail and my wife, and John Jones and Jimison Franklin.

Q. Whose wagon did you have that time?

A. Dickson Billie's wagon.

Q. How did you come back?

A. I come in a wagon. We staid all night at Hollis James's house. It was late anyway, and it was pretty near raining, too, and Hollis told us to stay all night; it was pretty near raining anyway, and we staid all night, and we came on home the next morning.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You know where John Le Flore lives?

A. Yes, sir.

Q. Do you know where the body was found?

A. No, sir.

156 Q. You don't know where the body was found?

A. No, sir.

Q. You know where McGilberry lived at that time, don't you?

A. Yes, sir; he lived in Hannah Sockey's house.

Q. You know where the ridge was up north of his house?

A. There is two ridges.

Q. Two ridges north?

A. Yes, sir.

Q. Was there a road running across from Le Flore's to McGilberry's house?

A. Three roads there.

Q. When you come from the ball play did you come down in sight of Le Flore's?

A. I turned right on top of the ridge.

Q. Which way did you go?

A. I come right towards Stephen's to get supper.

Q. Did you see C. B. Ward that day?

A. Yes, sir; C. B. Ward was with me.

Q. Where did you leave Ward?

A. Right on top of the ridge.

Q. Did you then turn in the direction of where this body was afterwards found; where you were told this body was found?

A. No, sir.

Q. You did not leave Ward and turn in that direction?

A. I left right on top over here [indicating]. Silas Ward went up here [indicating], and I went to Stephen's house; and Dickson lives back here [indicating].

Q. Didn't you leave Ward and go right down where you were told the "crazy nigger" was? Didn't you go from Ward right down to where you thought he was?

A. No; I don't think I ever told it.

Q. I didn't ask you if you ever told it. I asked you if when you separated from C. B. Ward if you didn't go right in the direction of where you had been told the "crazy nigger" was camped?

A. No, sir; I didn't. I didn't know he was at the camp.

Q. You didn't know he was camped?

A. No, sir; I never did know the man was camped up there.

157 Q. Didn't you leave the road there and turn to the right and go over to the right of McGilberry's?

A. Yes, sir; I went to Stephen's.

Q. You say you went to it; but didn't you leave the road and go over on the ridge?

A. No, sir.

Q. You didn't leave the road and go over on the ridge?

A. Right over here [indicating] is a ridge, and there is another ridge up here [indicating], and Stephen lives on that side of the road. I went around.

Q. But you went right along around the road and went to McGilberry's?

A. Yes, sir.

Q. Did you hear a gun fire?

A. No, sir; I didn't hear any gun.

Q. Are you sure of that?

A. Yes, sir.

Q. You are sure of it?

A. Yes, sir.

Q. Did you have your pistol along with you?

A. No, sir.

Q. What?

A. No, sir.

Q. You didn't have any pistol?

A. No, sir; I didn't have any pistol.

Q. Did you ever have a pistol at the ball play?

A. The first ball play?

Q. Yes.

A. Let's see. No; at the second ball play Jim Taylor give me a pistol. The second ball play I had a pistol. The first ball play I didn't have any pistol.

Q. Didn't you have a pistol the third ball play?

A. The third ball play at San Bois I had a pistol there.

Q. Didn't you have a pistol at the fourth ball play?

A. No, sir; I don't think I did.

Q. You didn't have any at the first, but you did at the second and third?

A. Yes, sir.

Q. Did you show Mr. Ward your pistol?

A. No, sir.

Q. At the time you parted with him up there?

A. No, sir; I did not show him any pistol.

158 Q. Had you showed him a pistol before that that day?

A. No, sir.

Q. Didn't you have a pistol that day?

A. At the second ball play?

Q. Yes.
A. Yes, sir.
Q. I am talking about the time you left Ward and went over to McGilberry's. Did you have a pistol that day?
A. No, sir.
Q. Did you tell Brandy that you killed this "crazy nigger?"
A. No, sir.
(Witness excused.)

159 This was all the testimony offered by the defendant.

Whereupon the Government called and examined the following witnesses in rebuttal, to wit: C. B. Ward and Cornelius Brandy, who testified as follows, to wit:

160 *Testimony offered by the Government in rebuttal.*

C. B. WARD, having been duly sworn upon behalf of the Government, was examined in rebuttal by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Mr. JAMES K. BARNES (of counsel for defendant). We object to the introduction of this witness on the ground that we have not been notified 48 hours before this trial.

The COURT. This is in rebuttal?

The ASSISTANT DISTRICT ATTORNEY. Yes, sir.

The COURT. I don't think it requires any notice.

Mr. JAMES K. BARNES (of counsel for defendant). We certainly would have objected to his testifying in chief if he had been offered, and we object to it now, and ask that an objection be noted.

The COURT. Yes.

The ASSISTANT DISTRICT ATTORNEY. Do you know Eli Lucas?
A. Yes, sir.
Q. Where do you live?
A. I live at Milton.

Mr. JAMES K. BARNES (of counsel for defendant). Have you ever been charged with any offense up there?

The WITNESS. No, sir.

Mr. JAMES K. BARNES (of counsel for defendant). Were you charged with murder up there?

The WITNESS. No, sir.

Mr. JAMES K. BARNES (of counsel for defendant). In the Choctaw courts?

The WITNESS. No, sir.

Mr. JAMES K. BARNES (of counsel for defendant). Wasn't you in the Scullyville jail?

161 The WITNESS. Yes, sir; I was in there once.

Mr. JAMES K. BARNES (of counsel for defendant). On what charge?

The WITNESS. Violating the permit laws, so they say.

The ASSISTANT DISTRICT ATTORNEY. Did you leave a ball play with Eli Lucas, the defendant, some time last year?
A. Last September; yes, sir.

Q. When was it?
A. Last September.
Q. Do you know what time in September?
A. No, sir; I don't.
Q. Do you know where John Le Flore lives?
A. Yes, sir.
Q. Do you know where McGilberry lives?
A. Yes, sir.
Q. Did you and the defendant separate from each other?
A. On our way back from the ball play?
Q. Yes.

Mr. JAMES K. BARNES (of counsel for defendant). I object to the question. He has never proven they were together yet.

The ASSISTANT DISTRICT ATTORNEY. Oh, yes; I did. He says they left the ball play together.

The WITNESS. We left there together, and there was some boys, I don't remember exactly who all was together, Jim Brandy and a boy I got to go with me, and Johnnie Jones, Stephen McGilberry—and there was Eli there, and I don't remember how many more. We all came from the play in a crowd together. And when I came to Mule Creek, when I crossed there, me and the boys that were together, this Simon Dwight, a fellow that crossed the creek, we came on about 100 yards or two hundred yards and Eli overtaken us after we had crossed the creek. And we came on together to where I met him that morning, and he turned off the road the way he came when I met him that morning.

Q. In what direction did he go?
A. Towards Stephen McGilberry's.
Q. Had you seen that colored man they called the "crazy nigger" there that morning?
A. Yes, sir.
162 Q. Was this defendant with you at the time you saw him?
A. Yes, sir.
Q. Was he along with you?
A. Who, Eli?
Q. Yes.
A. No, sir; he came in an opposite direction when I saw him.
Q. Did he see the colored man?
A. Yes, sir.
Q. What did you do with the colored man?
A. I asked him when we rode up there—I asked him if he hadn't been staying down at Le Flore's, and he told me he had.
Q. Was Eli present at the time?
A. Yes, sir.

Mr. JAMES K. BARNES (of counsel for defendant). I object to what the darky said.

The ASSISTANT DISTRICT ATTORNEY. I think it is admissible in the presence of the defendant.

The COURT. Out of abundant caution you had not better press it. I think it is admissible, too.

The ASSISTANT DISTRICT ATTORNEY. The defendant denied ever having seen him.

Mr. JAMES B. RUTHERFORD (of counsel for defendant). He was never asked that question.

The ASSISTANT DISTRICT ATTORNEY. Certainly he was. He denied seeing him; said he never had seen him.

The COURT. You can prove he saw him, but just omit the conversation.

The ASSISTANT DISTRICT ATTORNEY. In what direction did the colored man go?

A. I told him to go down to Le Flore's——

Q. Don't tell what you told him; just tell what direction he went.

A. He went north.

Q. Was that towards Le Flore's, or not?

A. Yes, sir.

163 Q. Now, when you came back and you speak about this defendant separating from you, in what direction did he go when he separated from you?

A. He went right the way he came in when I saw him that morning; he went to the right of the road.

Q. Right the way that the colored man had come from or the defendant? Which one?

A. The way they both came that morning.

Q. The way the colored man came from and the way Eli came from?

A. Yes, sir.

Q. That is the way Eli went?

A. Yes, sir.

Q. Did Eli have a pistol?

A. Yes, sir.

Q. State whether or not that was in the direction of McGilberry's—where Stephen McGilberry lived.

A. Yes, sir; he went right in the direction of McGilberry's.

Cross-examination by Mr. JAMES K. BARNES:

Q. Where did you see him that day? You say you went to the ball play with him, with Eli.

A. Yes, sir.

Q. Who else?

A. Jim Brandy and Stephen McGilberry.

Q. You went to the ball play with him. Where do you say you left Eli coming back?

A. I left him right where I met him that morning.

Q. Where did you meet him?

A. It was right on the prairie ridge; on Wild Horse Prairie.

Q. And he went in the direction of Stephen McGilberry's?

A. When I met him that morning we went on to the ball play together.

Q. And then when you left him that morning he went on to Stephen McGilberry's?

A. Yes, sir.

Q. He said he was going there, didn't he?

164 A. He didn't say where he was going. I just supposed he was.

Q. Where did you see that darky that morning?

A. I saw him right there where I met Eli and the darky and Jim Brandy and Stephen McGilberry. I met them right on top of the ridge in the prairie.

Q. How do you know Eli saw him?

A. Well, he was with him—Eli was riding along, him and Stephen McGilberry and Jim Brandy were riding along, and the nigger was walking right along ahead of them.

Q. You don't know whether he paid any attention to him or not, do you?

A. I don't see how he could help seeing him when he was walking right ahead of him.

Q. When were you elected as a witness in this case?

A. When was I elected?

The ASSISTANT DISTRICT ATTORNEY. When were you summoned, he means.

The WITNESS. I was summoned the morning of the 23rd of last March.

Mr. JAMES K. BARNES (of counsel for defendant). Have you ever been here before?

A. In this case?

Q. Yes.

A. No, sir.

Q. Never have?

A. No, sir.

Q. Are you any akin to Le Flore?

A. Yes, sir; we are some relation.

Q. You and him are some relation, are you?

A. Yes, sir; I believe so.

Q. What akin are you?

A. I don't know exactly; I don't remember.

Q. Don't you know that the last time that man was seen alive he was seen at your kinsman's house, Le Flore's?

A. Yes, sir; that is what he told me.

Q. I will ask you if you are not swearing now to help Le Flore out?

A. Which?

Q. Ain't you swearing here to bolster up Le Flore—help him
165 out—to divert suspicion from him.

The ASSISTANT DISTRICT ATTORNEY. I didn't know there was any suspicion on him. There is no evidence here tending to show any suspicion against him.

Mr. JAMES K. BARNES (of counsel for defendant). There ought to be. The last time he was seen alive he was at his place, and he was running him off. (To the witness.) How come you to get to be a witness in this case?

A. I don't know; I was just summoned here after I came here to town, on the 23rd. I came here about the 22nd, and after I got here I was summoned here.

Q. How come you to come down here?

A. I come down here to buy a little groceries and a few potatoes to plant.

Q. Then you got yourself summoned?

A. I was summoned.
Q. Who did you see here at that time?
A. I don't know; I don't remember exactly. I saw a good many here that I knew.
Q. Did you see Jerry Fullsom here?
A. Yes, sir.
Q. Was Jerry drunk, as usual?
A. I don't remember now; I believe he was a little—drinking some.
Q. He drinks a great deal, does he not?
A. I think so.
Q. He is rarely ever sober?
A. No, sir; I think not.
Q. Where was you when Jerry fell through the trestle down here?
The COURT. There is no use to encumber the record with this trestle. Jerry admits it. It does not make any difference where he was.
Mr. JAMES K. BARNES (of counsel for defendant). How long had you been here when he fell through the trestle?
A. Give me a little time and maybe I can study up where I was at.
Q. Was John Le Flore here at that time?
A. Yes, sir.
Q. John was here, too, was he?
A. Yes, sir.
Q. You knew John had been down here in December before that, did you not?
166 A. No, sir; I did not. I don't believe I did; not that I know of.
Q. Don't you know he had been here in February before that?
A. No, sir.
Q. You don't know anything about it?
A. No, sir.
Q. How come you to get to be a witness; who did you tell that you seen Eli, and all that stuff that you try to get off here; who did you tell that to? You certainly must have told it to somebody or you would not have been a witness.
A. I don't know; I guess there was somebody that saw me there with him when I went there to the ball play; there was a good many of them there when I and Eli and Jim Brandy and Stephen McGilberry——
Q. They never had that man Bazile (?) down here, a relation of Le Flore's, that sent the colored boy away, have they? They have never had him down here as a witness before?
A. Not that I know of.
Q. Do you know Mr. Cupps?
A. Yes, sir.
Q. Where does he live?
A. Out on the east edge of Wild Horse Prairie.
Q. Is he a Choctaw?
A. No, sir; I believe not.
Q. They never have had him here, have they?
A. I have not seen him here.
Q. Do you know a man named Al Perry, that worked at Le Flore's?
A. I know Albert Perry out in that country.

Q. Didn't he use to work there at Le Flore's?

A. I don't know; it has been a good while ago if he has; he hasn't worked there in the last year or two, I don't think; I don't know; it might have been three.

Q. He has not worked there in the last year or two?

A. I don't think he has.

Q. Wasn't he working there when the darky left?

A. I don't know, sir.

167 Q. How far do you live from Le Flore's?

A. About six miles.

Q. What akin is he to you?

A. We are some relation, about a second or third cousin.

Q. Now, which are you, second or third?

A. I don't know; that is something I never do, trace up kin-folks.

Q. You say they had you in jail up there?

A. Yes, sir.

Q. How long?

A. They kept me in there—that is, I staid in there from 12 until between 8 and 9 o'clock that night, when I got out.

Q. You got away from them?

A. Yes, sir.

Q. You made your escape?

A. Well, I reckon so. I got out. I did not run away or anything of that kind.

Q. You just walked off, did you?

A. Yes, sir.

(Witness excused.)

168 CORNELIUS BRANDY, having been duly sworn upon behalf of the Government, was called in rebuttal, examined in chief by J. B. McDonough, esq., the assistant district attorney, and testified as follows, to wit:

Mr. JAMES K. BARNES (of counsel for defendant). I would like to have a subpœna issued for John Kennedy, justice of the peace.

The COURT. What for?

Mr. JAMES K. BARNES (of counsel for defendant). This witness has been convicted of larceny before Justice Kennedy, and served a term in the county jail.

The COURT. You could not prove it by Kennedy.

The ASSISTANT DISTRICT ATTORNEY. He is no record.

Mr. JAMES K. BARNES (of counsel for defendant). I want him and his record.

The COURT. It does not make a bit of difference if the witness has been convicted. The Supreme Court has settled that question for us. They do occasionally stumble on to something that benefits the Government. The only thing you could use that for would be to affect his credibility. But the Supreme Court has settled the question that you can not use a conviction in another jurisdiction to render a witness incompetent. This court has held otherwise, but of course the Supreme Court has settled that, and we have to submit to it.

Mr. JAMES K. BARNES (of counsel for defendant). That is in this jurisdiction.

The COURT. It is?

Mr. JAMES K. BARNES (of counsel for defendant). Yes, sir.

The COURT. Is his court this court?

Mr. JAMES K. BARNES (of counsel for defendant). It is not this
169 court, but it is in the western district of Arkansas. I want an objection noted.

The ASSISTANT DISTRICT ATTORNEY. The counsel stated in the examination of another witness that that witness put himself with this witness because this witness had been convicted and could not be used as a witness, and for that reason I want to call this witness.

The COURT. He can be used. You can ask him if he has been convicted of larceny, to affect his credibility. You can prove it by his admission or by the record either.

The ASSISTANT DISTRICT ATTORNEY. Your name is Brandy, is it?

A. Yes, sir.

Q. What is your first name?

A. Cornelius Brandy.

Q. Where do you live?

A. I live at Panther.

Q. Do you know the defendant, Eli Lucas?

A. Yes, sir.

Q. Did Eli Lucas ever tell you anything about killing a man, or a pistol killing a man?

A. No, sir; he never told me. He told another fellow.

Q. Did you hear him?

A. Yes, sir; I heard him.

Q. Who was the other fellow?

A. Mack King.

Q. Just tell what he said.

A. Me and Mack King was in one room together and he come in there, and after a while we were all talking and going on, and after a while he says—he told Mack King that that pistol killed that crazy nigger, and was laughing and going on, you know. We were all laughing and going on.

Q. He told him that pistol had killed that "crazy nigger?"

A. Yes, sir.

Q. Whose pistol?

A. I don't know. It was under the pillow when Mack took it out. I don't know whose pistol it was. There was lots of young men
170 lives at that house, and I staid there, too, and Mack taken it out and was looking at it, and I was in there with him; and that is just what he said, and I went out just as soon as he said it. After a while Eli came out, and he said—I asked him if he did kill that nigger, and he said no, he was just joking with us. He said no.

Q. When was that?

A. Along in September, I think.

Q. Did he ever tell you after that? Did you ever hear him saying anything about it after that?

A. No, sir; I never heard anything about it until he was arrested.

Q. Were you with the party that went to where the body was found?
A. No, sir; they came down where I lived to hunt me, but I wasn't at home.
Q. Is that all he said about the pistol?
A. Yes, sir.

Cross-examination by JAMES K. BARNES, Esq.:

Q. Who was there when he said that—just you and Mack King?
A. Yes, sir; just me and Mack King when he came in the house.
Q. Just you three together?
A. Yes, sir.
Q. Nobody else heard that except you three?
A. Just me and him was all that was there.
Q. And that was at Jerry Fullsom's, was it?
A. Yes, sir; at Jerry Fullsom's house.
Q. Yes, I thought it was. Everything takes place there.
A. But Jerry wasn't there.
Q. Jerry had gone off after whiskey, hadn't he?
A. I think he did.
Q. And you were full of whiskey then, too, wasn't you?
A. I was drinking, but I wasn't full.
Q. And Mack was drunk, too, wasn't he?
A. He was drinking. I don't think he was drunk. I don't
171 know anything about it, what he was doing, but then——
Q. Was Eli drunk?
A. Eli was drinking.
Q. All three of you were there drinking?
A. Yes, sir.
Q. And blowing around?
A. Me and Mack was in there talking and laughing and going on, and Eli came in there, and me and him——
Q. Wasn't John Jones there?
A. No, sir; he wasn't there.
Q. John wasn't there?
A. No, sir.
Q. Oh, he was there, wasn't he?
A. No, sir; he wasn't.
Q. Where in the world was poor John when you had the whiskey?
A. I don't know anything about that.
Q. You got drunk off of Mack Jones's whiskey, didn't you?
A. No, sir; I wasn't in there drunk when we were all in there.
Q. You were drinking?
A. Yes, sir; I was drinking, of course.
Q. Don't you know you never fail to get drunk in your life when the opportunity was presented to you?
A. Yes; but I wasn't drunk that day. None of us were drunk. That is the reason I asked him better. I asked him better if he had killed that nigger, and he said, "No; I was joking with you."
Q. He was laughing at the *the* time he said it, wasn't he?
A. Yes, sir. We were all laughin' and going on together, and I asked him if he did kill that crazy nigger. I never did see the nigger before

in my life; I just asked him if he had killed that nigger, and he said no, he never killed him.

Q. Y'u have told all that he said there to Mack, haven't you, and all about it?

A. Yes, sir.

Q. And then you called him to one side, and you said, "Did you do that, Eli?" and he said, "No; I was just joking."

A. He told me this way: He went out—I went out first—and he came up to the upstairs porch, where it was cool, and I was sitting there, and he came there where I was, and I says, "Did you kill that
172 crazy nigger sure enough, Eli?" and he said, "No; I was just joking with you boys."

Q. He was laughing when he said it, and you were all joking there?

A. Yes, sir.

Q. Who did you tell him you had killed?

A. I never told nobody until he was arrested, and then Jerry asked me did he kil' the nigger.

Q. Jerry asked you? I thought it would get out. Jerry asked you, did he?

A. Yes, sir.

Q. Where did he ask you?

A. At home.

Q. Are you any akin to Jerry?

A. No, sir; I was raised there with him.

Q. You were raised with Jerry?

A. Yes, sir.

Q. How long has it been since you have been in jail over here?

A. What jail?

Q. How many have you been in? You seem to be astonished.

A. Well, what jail?

Q. How many have you been in?

A. I could not tell you.

Q. You were almost raised in jail, were you not?

A. Yes, sir.

Q. You had rather be in jail than out-side, wouldn't you?

A. No, sir. I have been in the county jail and cal'abo'se, is all I know about.

Q. Were you ever in the U. S. jail?

A. No, sir.

Q. Were you ever in the Choctaw jail?

A. No, sir; we haven't got no jail.

Q. Were you ever under guard up there?

A. No, sir.

Q. How old are you?

A. I am growing on 22 years old.

Q. How often have you been in the county jail over here?

A. Twenty-five days.

Q. For what?

A. For stealing a Winchester is what he called it.

Q. You were convicted in Judge Kennedy's court up here,
173 wasn't you?

A. Yes, sir.

Q. And then you have been in there at various times for being drunk and disorderly. Didn't Kennedy send you to jail not long ago since you have been to this court?

A. County jail or U. S. jail?

Q. County jail.

A. Yes, sir.

The COURT. That don't count; U. S. jail is what counts.

Mr. JAMES K. BARNES (of counsel for defendant). You have spent about all your life in jail?

A. I have been in the U. S. jail 20 days once.

Q. You told me you never was in that jail a while ago?

A. You don't tell me what jail.

Q. You were over there 20 days?

A. You ought to asked me what jail. Don't you know all the jails around here?

Q. Did you ever see that gentleman sitting up there [referring to the court]?

A. Yes, sir.

Q. He sent you over there, didn't he?

A. Yes, sir; he give me 20 days, but I didn't stay but 16. He give me four days good time.

Q. You behaved yourself over there, did you?

A. Yes, sir.

Q. You always behave yourself in jail better than you do out, don't you?

A. Or anywhere else.

Q. Are you acquainted around McAlester and Muskogee?

A. Yes, sir.

Q. Did you ever try the jails up there?

A. I have been in the McAlester jail 30 days once.

Q. How do you like that jail as compared with this one over here?

A. They are just alike.

Q. Don't you like this one much better than the one at McAlester?

A. I could not tell you all about it.

Q. Don't you think this judge is a heap cleverer man than that
174 judge up there? He only give you 20 days and the other give you 30. Don't you think he is heap the best man?

A. Yes, sir.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. The defendant brought you here as a witness, didn't he?

A. Yes, sir; but I have to tell what I know.

(Witness excused.)

175 This was all the testimony offered on either side.

Whereupon, after argument by counsel, the court charged the jury orally as to the law of the case, which charge was taken down at the time by the court stenographer, and was as follows, to wit:

176 *Charge of the court.*

PARKER, *J.*:

Gentlemen, the defendant in this case is charged with the crime of murder. The first count charges that he committed murder by killing

Levy Kemp, alleged to be a colored man and not an Indian; that he killed him with a gun, and that he killed him willfully and with malice aforethought. The second count charges the same offense, but it charges the killing of a person whose name was unknown to the grand jury. It charges the killing in the same manner, that it was done with a gun, and that he was killed willfully and with malice aforethought. I will now give you the law that is to be used in the case as briefly as possible. In the first place, you are required to find that Kemp, the man killed, or the unknown man, if you should believe his name has not been established, was a negro and not an Indian. That means he was a citizen of the United States; that means that the court has jurisdiction of the case under the law. You may find that proposition by circumstances, as well as by what is called positive proof. The fact is, you can only find a man's nationality and his name by circumstances. You may find it proven that way just as any other fact in the case may be proven. If you find he occupied that status, then this court has the right to
177 hear and determine the case upon its merits; that means jurisdiction to try the case. You have a right upon that proposition to take into consideration the facts that have gone to you for the purpose of showing who he was and where he came from. It is sufficient if the Government makes out a case of jurisdiction that has not been refuted, that has not been overthrown. Of course it is required to prove this as it is required to prove any other fact, beyond a reasonable doubt. Now, after that is established, the next proposition you are required to find is that Levi Kemp, or the unknown man, if you should believe his name has not been proven sufficiently, is dead. Now, that involves, of course, at this point, identification of these remains that were found, and which have been offered in evidence, and about which statements have been made by the witnesses in the case, as the remains of Levi Kemp, or of an unknown colored man. There are different methods of identification. Identification, of course, is easier where a party who is sought to be identified is alive than when he is dead, because when he is dead and his appearance, his face, his features, his form, have entirely disappeared, as a matter of fact we have to depend upon what is called extraneous facts for identification. If a man is alive who is your friend, or acquaintance, or even a man you are not acquainted with, and you look at his face, you are able to identify him by his very appearance. You can not always tell the reason why you do it, how you do it, but you are able to recognize him when you see him again, and are able to swear to his identity. Of course you can not do that when you have nothing but the remains of a human being. Therefore, if we are to ascertain whether there is a case of crime in a case like this the law must permit us to adopt some other means than that positive method which we can apply by the sense of seeing. We are permitted to do that, and in order that you may understand this matter of identification, and how it may
178 be arrived at, I propose to read from another case where the authorities upon the subject of identification were fully collected:

"Now, this case is like hundreds of others that occur in the administration of justice in this country, where you can not look upon the face of the dead man, or look into it, and say that it is the face of a certain party (in this case Levi Kemp)——

Mr. J. K. BARNES (of counsel for defendant). What case is your honor reading from?

The COURT. From the Graves Case, "——because the face has been destroyed; it n' longer exists. And right here the question becomes pertinent, How, then, are we to establish the identity of a party? How are we to ascertain that? You see a man alive that you are acquainted with—your friend; a man that you have met often. You can look into his face, and from the nature of that face, its form or appearance, and its very cast, its features, its lineaments made up of a number of things, and from this combination of things that produces a certain appearance, and this combination as it is illuminated by the light that comes through the windows of the soul, his expression and intelligence that exists in the human mind, that beams out through the face, you may know him. You can look into the face of a friend or acquaintance, and you can name him as a man of a certain name that you know. Now, when a man dies, this illuminating power that is connected with the human mind, and has come from the mind, disappears, and necessarily the human face, while it is preserved until it is decayed or until it is destroyed, only presents the general outline that it had when the party who possessed it was alive. There is something about it in life that is gone forever; it is destroyed, and you will have a little more difficulty in recognizing the face of a dead man, although he may be an acquaintance, yet as a rule you can generally recognize him by his face. But suppose his face
179 is gone and the body is entirely destroyed, what, then, are you to do? If a man has been murdered, the rights of society and its members have been trampled upon by a brutal assassination. Are you to make no effort to discover that crime and punish the criminal because the identity of the remains, or of the person, by the means I have named are not to be ascertained? Not at all. You can go to the means that are extraneous of the body of the person. You can, in other words, fall back upon that evidence that is so often and so generally and usually relied upon, called circumstantial evidence, to ascertain that fact." Now, what is meant by circumstantial evidence—that is, the fact to be proven in this proposition that I have named? Why, that these remains were the remains of the missing unknown man as named in the second count of the indictment, or the remains of Levi Kemp. That is a proposition that if a man would come before you and say, "I looked at the dead body—I saw it, and from its face, its form, and appearance I know it," you would take that evidence as evidence of the fact of identity.

Now, that, of course, is not the only way. There must be other means afforded, as I have told you. Suppose that the dead body has been discovered, or its remains have been found, as is claimed in this case. The next step in the direction of proof of what is called the corpus delicti (of which I will explain to you the meaning presently) is the fact that a crime has been committed, and that the body has to be identified in order to establish the element of that crime. Mr. Burrill, an eminent writer upon the subject of circumstantial evidence, says:

"Where the body is found shortly after the commission of the crime, and the face has not been disfigured by the violence employed or by accident or in the natural course of decay, the identification is made in the

form of direct and positive proof of the fact by those to whom the
180 deceased is known. But where the features have been destroyed the body may be identified by circumstances, as by the dress, articles found on the person, and by natural marks upon the person. In Colt's case, where a considerable portion of the face had been beaten in by blows, and the progress of decay had otherwise rendered direct recognition impossible, the body was identified in this way. In McCann's case, where the face of the deceased had been eaten away by hogs, identification was effected in a similar manner. Even where nothing but the skeleton has been found, it may sometimes be identified by peculiar marks, and by objects discovered near it."

In this case, such as the clothing, such as the trousers, or any other item that may be identified, or any other fact or circumstance that may go to show that these bones are the bones of the missing man called the "crazy nigger" Levi Kemp, if that was his name, or, if his name was unknown, the unknown man.

"In the case of Rex v. Clews (4 Carrington & Payne, 221), the body of a man, after the lapse of 23 years, was identified by his widow from some peculiarity about his teeth, and by a carpenter's rule and a pair of shoes found with the remains and also identified. But in examining skeletons great attention should be paid to their anatomical characteristics, upon which the important fact of the age and sex of the person depends, as these may be decisive of the whole case in favor of the accused.

"Where the body has been purposely mutilated, and especially where it has been dismembered with a view to its destruction, by fire or otherwise, its identification becomes a matter of greater difficulty, the head being usually destroyed first, for the very purpose of preventing recognition, but it occasionally happens that even the agency of fire, which is generally selected as the readiest and most effectual means of
181 destruction, proves inadequate to the purpose contemplates. In Webster's case, the head of the deceased had been placed in a furnace, and exposed to a strong heat for a considerable time, but some blocks of mineral teeth resisted the action of the fire so effectually that they were identified by a dentist as a part of a set of artificial teeth which had been made for the deceased, and which the latter wore at the time of the disappearance. Some other portions of the body which had not been subjected to the action of the fire were also identified by peculiar appearances. A case is mentioned by Mr. Wills in which the remains of a female, consisting merely of the trunk of the body, from which the other parts had been cut, were identified by a curious train of circumstantial evidence, embracing several facts of conduct on the part of the prisoner."

Mr. Wills, on circumstancial evidence, further says:

"It is not necessary that the remains should be identified by direct and positive evidence, where such proof is impracticable, and especially if it has been rendered so by the action of the party accused. A man was convicted for the murder of a creditor who had called for the payment of a debt, and whose body he cut in pieces and attempted to dispose of by burning. The effluvium and other circumstances alarmed the neighbors and a portion of the body remained unconsumed, sufficient to prove that it was that of a male adult, and various articles which had belonged

to the deceased was found on the person of the prisoner, who was apprehended putting off from Black Rock, at Liverpool, after having ineffectually attempted to elude justice by drowning himself."

Mr. Wills says further with reference to this matter of identification:

"Identification is often satisfactorily inferred from the correspondence of fragments of garments, or of written or printed papers, or
182 of other articles belonging to or found in the possession of parties charged with crime, with other portions or fragments discovered at or near the scene of crime, or otherwise relating to the corpus delicti, or by means of wounds or marks inflicted upon the person of the offender."

This shows, and the purpose for which I have read it is to show you when you can not have evidence such as would come to you from the witness who states that he knew the man by his face, by his appearance—when you have not that sort of testimony that is denominated positive testimony, because of its nearness to the main proposition to be established—then you can rely upon these extraneous circumstances, such as the clothing, or such as articles found about the person, such as any extraneous thing that goes to show the identity of the deceased or missing man with these bones, because the Government claims that these are his bones. Any other fact connected with these bones or to his death, or near the place—these trousers or any other garment, or any other evidence of that kind—these are called facts extraneous to the body—extraneous of the body of the person who is claimed to have been killed. These are things that may be used for the purpose of identification. If the trousers are identified by persons who knew them, by the party who gave them to him, and by any other party who knew them, you have a right to take that fact into consideration. That is a fact, though, that is extraneous of the body; that is a circumstance in the case that goes to you for the purpose of identifying these remains as the remains of the missing man Levi Kemp, or the missing colored man, if his name was unknown.

Now, gentlemen, you are to look at all the circumstances connected with these bones at that place for the purpose of showing to you whether or not these are the bones of the missing man. If you find they are, you may take that as evidence of his death, because you know it
183 is a matter of common knowledge with you and all others that it is physically impossible for his bones to be in that condition and for him to be alive, and that condition would therefore establish the fact that he was dead. Then, if that proposition is proven, and proven beyond a reasonable doubt, you may lay it aside as one proposition established in the case.

Now, next, you are to find that he died by violence of the kind named in the indictment. It is stated in the indictment that he was shot with a gun. If the proof shows he was shot with a pistol or gun either one, that is sufficiently responsive to the allegation, because they are of the same family of weapons. A gun is a pistol and a pistol is a gun in legal contemplation; they are terms that have the same meaning, and the Government may allege the use of one and prove the use of another. If you find that fact established, and you may find it by circumstances, you may find it by evidence of a bullet hole or bullet holes in the clothing—

any fact of that kind—if you find that established, I say, in that way, you may put it aside, if it is proven beyond a reasonable doubt, as a proposition entering into the body of the crime.

Now, the next proposition to make up the body of this crime is that he was thus shot or killed willfully and with malice aforethought. Now, it is necessary that we should define these expressions—the expression "willfully" and the phrase "malice aforethought"—because they enter into the crime of murder; they go to show when murder exists; they are the characteristics of that crime. A willful killing means an intentional killing, and not an accidental killing. A man shoots another by presenting a gun at him, or a pistol, and firing that gun or pistol, you have a right to take these facts into consideration to show that he did that killing willfully. You will bear in mind if the proof shows
184 that he used a weapon in that way intentionally, purposely, and willfully, and it kills, it produces death, the law says upon the principle that he is held to have intended the necessary, natural, and probable consequences of what he does, that such a state of facts would authorize you to come to the conclusion that the death was willful, that he intended the result that was produced by the act so done by him. Now, to find whether a man does a thing of that kind willfully or not, you look at the manner in which he uses the weapon. First take the character of the weapon used. I say the character of the weapon. That means what kind of a weapon it is; what it is meant for. Is it made for the destruction of animal life or human life or the lives of the lower animals? If it is made for that purpose and adapted to the purpose of its construction, as it presumably is if it is in a condition to shoot, then if there is a power acting upon it, it being passive, and such a power acting upon it as to produce a deadly result in the minds of reasonable men, in the minds of sensible men hunting for a rational conclusion there would naturally be founded a conviction that from the manner of the use of that weapon you could reasonably infer that the party intended to use it, or to shoot with it, and if he intended to shoot with it at another within shooting distance of that other, the law says he intended to kill that other. That is the way you may find it from the intentional use of the weapon in such a way as to produce death. Then look at the consequences to see whether that was produced, see whether death was produced by it; see whether the weapon was willfully used or not and death was produced by it, and if so, from these two propositions you are authorized to infer that the party willfully produced death, that he willfully killed. That is what is meant by that expression. It is not necessary to elaborate it any further, because when I remind you of the means that you may adopt to find that conclusion, you are authorized to go to
185 these means or to these facts, to see first whether they exist in the case or not, and then use them just as you would use them as reasonable men if you were hunting for the truth of a proposition of like character that was presented to you under circumstances where you are called upon to make an investigation and to come to a rational conclusion. That is the meaning, then, of an act that is done willfully.

Now, the other characteristic of the crime is that it is done with malice aforethought. That means the doing of a wrongful act willfully and intentionally which produces death, without just cause or excuse, and in

the absence of any mitigating facts, and the law recognizes the condition to exist that if the proof shows a killing that is done willfully, shows that one man with a gun or pistol willfully takes the life of another, and there is nothing shown in the case that gives him the right under the law to take that life, or anything that could be offered to mitigate the crime from the highest grade to one of less grade or less importance called manslaughter, the proof which under the circumstances shows a willful killing, shows a killing with a gun or pistol willfully used, shows a killing with malice aforethought, because the definition of that expression is the willful doing of a wrongful act which results in death without just cause or excuse, or in the absence of legal provocation.

Another definition of this expression—that is, the characteristic of murder—is that it is a killing done in such a way and under such circumstances as to show that he who did it had a heart void of social duty, and a mind fatally bent upon mischief. That means that he took the life of a fellow-man, of a human being, without just cause or excuse in the law, and in the absence of mitigating facts; that he forgot his social duty, which is to protect life and not to destroy it, to protect
186 innocent life and not to destroy it; that he so far forgot his social duty as to recklessly and wantonly and wickedly deprive a fellow-man of life. That is another definition of the expression known as malice aforethought, which enters into the crime of murder, and which characterizes it as murder, and as being different from any other crime growing out of the taking of human life. Now, you find it in the same way that you find the other proposition, which is called a killing done willfully. You find it by the circumstances. You can not find it in any other way, because both of these conditions are conditions of the mind, and you can not find mental condition except by circumstances; you can only find it by the character of the killing. If you find that killing was wrongfully done, you then look to the evidence to see whether there is anything in the case, to see whether the party offers evidence showing that he had a right to do it, or that he offers in the case, or there is anything in the case, arising from the whole testimony, showing that the killing was one which could be mitigated under the law, because the party killed, the man Levi Kemp, or the unknown colored man whose name was unknown, was doing that at the time he was killed which gave the party who killed him the right to claim that the offense could be mitigated under the law. If there is an absence of these conditions, this condition of self-defense, and this condition where the crime is recognized by the law as one of less magnitude, and the proof shows that the killing was willfully done, the same evidence shows that it was done without just cause and in the absence of legal provocation or mitigating acts, and it consequently fills out to the uttermost the definition of malice aforethought.

Now let me read to you briefly from a case tried before Mr. Justice Field when he was upon the bench in the circuit court in California, trying a case of murder, the case of United States v. Outerbridge, when he said:

"Malice is implied in every case of intentional homicide."
186 That is, in every case of willful homicide. "That is to say, when once it is established that a person intentionally killed,

the law implies that malice existed in the party who caused the death." If the proof shows that a man intentionally kills another, willfully kills another, and there is nothing else shown in the case to justify it or mitigate it, the same evidence, as I have told you, that shows that he killed him willfully shows that he did it with malice aforethought. "If there are any circumstances of excuse or palliation which will rebut the implication of malice it is incumbent upon him to show them. The burden of proof rests upon him, for the law presumes that every person intends to produce the results which are the consequences of his acts. A man can not strike another violently with a bar of iron without inflicting bodily pain. If therefore he does thus strike another, then the law presumes that he intended thus to inflict pain. The usual effect of a leaden ball fired from a loaded pistol of the common size at a distance of a few feet when striking the head or back of the person is to kill such person. The law therefore presumes that every one who thus fires a loaded pistol within a few feet of the object intends to kill. It therefore implies malice in him."

Now, he may rebut that; the evidence in the case may overcome that; proof may be offered to show that when he did that intentional firing he did it in self-defense, he did it because the party was doing something that produced a state of sudden passion, and that may be used under the law to mitigate the crime, but this language says if there is nothing in the case shown, the fact that he killed him willfully or intentionally goes to show a state of case that shows malice aforethought.

Now, a word further upon the subject of what is meant by this expression called malice aforethought. I don't believe I can find the book, but I can repeat it anyhow. The laws says it may arise from
187 either one of two conditions. If a man kills another because of special spite or grudge or ill will that he has against him and that is the reason of the killing, he did not kill him because he is defending himself under the law, or has the right to defend himself; he did not kill him because the other party is doing something that was inflamming his mind that he can have his crime mitigated, but he kills him to satisfy a feeling of ill will, or to satisfy a grudge, a condition of spite or animosity against him, the law says that evidences malice aforethought. It springs from a special condition of mind in that sort of a case. But it does not always spring from that condition of mind. The law says that if a man wantonly and wickedly, without just cause, or in the absence of mitigating facts, takes human life, from a state of general malevolence, from such a depraved condition of mind as that he has no regard for the right to life possessed by that other, that evidences the existence of malice aforethought as thoroughly and as completely as when he takes his life from special spite to satisfy a particular grudge or to satisfy a state of ill will. The existence of either goes to show malice aforethought. A case where general malevolence exists is evidenced by a reckless and wanton and wicked killing without just cause or in the absence of mitigating facts.

Now, then, if you find the existence here of those things that I have enumerated, to wit, the fact that this man—either known by the name of Levy Kemp, as set out in the first count in the indictment; or that his name was unknown—is dead, that he died by violence of the kind named in the indictment, or kindred violence, and that that was inflicted will-

fully and with malice aforethought, that makes out what is called in the law the corpus delicti of the crime, or of the charge that is set out in this indictment—the fact that a crime such as is charged was committed; that he is dead; that he died by violence; that he died because that violence was used willfully and with malice aforethought upon him; and if so, that shows that a crime such as is charged in this indictment was committed. The law says that that general proposition is first to be established either by positive proof or by circumstances outside of the confession of the defendant. Now, the declaration that you can not convict a man upon a confession alone has been misunderstood. It has been taken as a true proposition that if there was no other evidence in the case but a confession that you could not convict the man. Well, you can not prove the corpus delicti by a confession. If a man comes into court, and says, "I murdered a man," and there is no evidence that anybody has been murdered, there is no evidence that anybody has been killed but that man's statement, the law says it is not sufficient to convict upon that. But if the proof outside of that confession, the circumstances or facts, shows that a crime has been committed, the evidence in the case shows the use of deadly violence upon the party killed, and the party was killed, and the party named in the case here as having been the party that was killed, if these facts and circumstances show that, if that is established beyond a reasonable doubt, then you may take the confession of the defendant that he was the party who killed that man, who committed that crime, who did that deed, as being sufficient evidence to authorize you to convict. Now, a word or two further upon that subject that may enlighten us a little further:

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"Corpus delicti. It has been already said that corpus delicti includes two things, first the objective, and then the subjective limits of criminality. In other words, that the killing takes place, and secondly, that it took place through criminal agency." That is, that the crime of murder such as is charged in this indictment was committed by somebody. That is the corpus delicti. "In a homicide, therefore, it must be held essential to conviction, first, that the deceased should have been shown to have been killed, and secondly, that the killing should have been proved to have been criminally caused."

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After that is proven you may take the confessions of the defendant into account for the purpose of showing that he is the party who did that deed, who committed that crime. Then, in this case, upon this point you are to look at all the facts and circumstances going to show the use of any such deadly violence as is named in this indictment as having been used upon the person of the man found dead, if you find that was the state of case. If you have evidence showing deadly wounds upon him, though that evidence may be extraneous of the body, because the body is no longer visible, it is gone, it is destroyed, it is decayed, carried off and eaten up, perhaps, by the wild animals; but that fact, like any other may be shown by the existence of these circumstances, like the circumstances that go to show identity that may be extraneous of the body, they may consist of evidence in the shape of bullet holes in the clothing of the man—these may be taken into account together with any other facts and circumstances, such as the hearing of a gunshot in the direction of where the body was afterwards found, or any other facts or cir-

cumstances that have been offered before you as evidence to show the use of deadly violence upon the man. When that is proven, if it is established beyond a reasonable doubt, then you go to the statements of the defendant, the admissions or confessions of the defendant to show whether or not he was the author of that crime, the author of that killing, the man who is responsible for that homicide. Now, the law attaches credit of a certain character to evidence of that kind. It recognizes the fact that the degree of credit due to these confessions or admissions is to be estimated by the jury under the circumstances of each case. The law says, of course, that they are to be freely and voluntarily made.
190 They must have that characteristic. They may be made in confidence to a friend; they may spring from a spirit of bravado that sometimes exists in that country which prompts men, and especially an ignorant man, of one race to boast to his friends of having killed a man of another race. They may spring from that cause. If they are freely and voluntarily made, and they are correctly detailed to you by the witnesses, the law says that they are proof that you may depend upon, and they are proof going to show the identity of the party who committed the crime, that may be sufficient for the purpose of showing the identity, subject to these cautions that I have given you, and that is the caution of the law, in receiving and weighin' them.

Reading from Greenleaf on Evidence, vol. 1, sec. 215:

"Subject to these cautions in receiving and weighing them, it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law. Their value depends on the supposition that they are deliberate and voluntary and on the presumption that a rational being will not make admissions prejudicial to his interest and safety unless when urged by the promptings of truth and conscience. Such confessions so made by a prisoner to any person, at any moment of time and at any place subsequent to the perpetration of the crime and previous to his examination before the magistrate, are at common law received in evidence as among proofs of guilt. Confessions, too, like admissions, may be inferred from the conduct of the prisoner and from his silent acquiescence in the statements of others respecting himself and made in his presence, provided they were not made under circumstances which prevented him from replying to them."

Now, gentlemen, that is the character that they have in the law. When they are freely and voluntarily made, and if the proof otherwise shows the existence of what I have named to you and as known to the law as the corpus delicti, the fact that a crime such as is charged in the indictment was committed by somebody, you may take these
191 confessions to bring that crime home to the defendant. Of course, it is always better when you have any specific kind of testimony to look through the case to see whether there are any other items of evidence, any other circumstances, that go to corroborate these confessions, going to show the opportunity of the defendant to commit the crime; any other fact or circumstance that goes to strengthen his statements made and the confessions. I say that is best as to all kinds of evidence in the case. You have the statement, for example, of a positive eyewitness to a fact; it would be your duty to go through the whole case to see whether there were any other facts corroborating what he says to

substantiate what he says. If there are other circumstances that go to show the truthfulness of a positive statement of that character, then you rely upon it with greater certainty than when you take it alone. And the same with reference to a confession of a man charged with crime freely and voluntarily made. You look through the whole evidence to see what other facts and circumstances there are in the case that go to corroborate what he says.

Now, gentlemen, you are the judges of the credibility of the evidence. You are the judges of the credibility of the witnesses who come before you. You will bear in mind, of course, that you are not to set aside the testimony of a witness without good cause, without sufficient reason, upon the mere denunciation of that witness. You can not do that. The law does not authorize any such rule. You are to look at the reasonableness and naturalness of these statements, their consistency, their probability, and whether the statements of one corroborate the statements of another. You are to take into consideration these reasonable rules that you apply to the statements of men when passing upon such statements outside of the jury box in considering a matter of importance to which these statements may pertain. You take them into account in that way. You do it every day in passing upon the truthfulness of
192 statements made, and you are to apply precisely the same rules here that you apply outside of the jury box when you are acting deliberately and intentionally upon a matter of great concern, of great importance, affecting another. The law which says that you are to look at the credibility of witnesses commands you to look at the credibility of all of them in the light of their opportunity for knowing the facts, and in the light of these things that go to characterize the truth or the falsity of their statements as they may be consistent or inconsistent, or probable or improbable, or natural or unnatural.

The defendant goes upon the stand. He makes his statements. You are to consider them in the light of their consistency, their reasonableness, and their probability, and in the light of his attitude in the case, and his consequent interest in it. You above all look at his statements in the light of the other evidence. If the other testimony contradicts what he says, if it contradicts his evidence, and that evidence which contradicts his statements is reliable, is such that you can depend upon it, he stands in the attitude of a witness whose testimony would be weakened by the contradictory facts that come from the other witnesses that you can depend upon, if you can depend upon them. If his statements are corroborated by other witnesses who are reliable, you have them sustained to the extent of credit you may attach to the sustaining facts.

Now, in reference to these statements and efforts that have been made to contradict the statements of witnesses by showing that they made statements before the commissioner inconsistent, as it is claimed, with the statements made here on the witness stand. You will bear in mind that the statements offered as contradictory statements come to you second hand. They come to you as the result, first, of the hearing of the man who wrote them down, the clerk for the commissioner; and,
193 secondly, as the result of his correct work after he has heard it. Now, here are two processes that he must employ upon these

statements before they are reduced to writing, and you may consider that he may not have heard them, in the hurry of business, correctly, and if he did hear them, in his effort to get down what was said he may have made a mistake as to what was said. You will take the statements of these witnesses as to whether they said these things or not, their memory as to what they said, and their apparent integrity and apparent truthfulness and consistency in saying whether they made these statements or not. That evidence, when you come to use it as a contradicting method, is one that may be employed, but it is to be employed with this caution that I have given you.

Now, gentlemen, the law says that these propositions involved in this case, either by circumstantial testimony or positive proof, or by both combined, must be established to a degree of certainty named in the law as proof beyond a reasonable doubt. It is right and proper that you should know what is meant by that; what the law means when it says that these things shall be established beyond a reasonable doubt. It does not mean that the case has to be demonstrated like you could demonstrate a proposition in Euclid's geometry or any of the certain sciences, because you can not prove a thing growing out of human conduct in that way. It can not be done as a rule. And when the law commands you to enforce its provisions it does not with one breath command you to do it and with the other set up such a state of case as to make it impossible for you to do so. It contemplates that you can accomplish possibilities or probabilities, but that you can not accomplish that which can not be accomplished by mortal man. You can not demonstrate, I say, a problem growing out of human conduct. The law tells us the degree of certainty that we are to arrive at. It defines it concisely and accurately. It says that we start into the case with
194 the presumption of innocence in favor of the party charged with crime. Now, that means, notwithstanding he is charged with crime, that until the proof shows beyond a reasonable doubt otherwise than that state of innocence, that he is innocent, but when it does show that, this presumption of innocence disappears from the case. It is no longer in it, but the proof drives it out when it goes to that degree of certainty known as proof beyond a reasonable doubt. Let us see for a moment what the Supreme Court of the United States says about this doctrine of proof of a case beyond reasonable doubt, reading from a charge that was given by a court below and approved by the Supreme Court:

"The court charges you"——

Mr. J. K. BARNES (of counsel for defendant). What case is that?

The COURT. Haupt v. Utah, 120 U. S. Reports. "——that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And, if after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

I say relating to the affairs of other men, because when it comes to our passing upon the question as to whether a case is proven beyond a reasonable doubt, if we are to measure that state of case by a state of case affecting our own affairs, we are more liable to lean towards our own affairs than we would be to remain indifferent, and the proper way, in my judgment, to put the proposition and to do justice to the
195 defendant, is to say if your minds are carried to that degree of certainty that you would be willing to act upon in the more weighty and important matters relating to the affairs of others of importance, then you have no reasonable doubt.

"In many cases," the court says, "if the jury is told that they should be satisfied of the defendant's guilt beyond a reasonable doubt, that that is sufficient." "In many cases it may undoubtedly be sufficient. It is simple, and as a rule to guide the jury is as intelligible to them generally as any which could be stated with respect to the conviction they should have of the defendant's guilt to justify a verdict against him. But, in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension. As a matter of fact it has been the general practice in this country of courts holding criminal jurisdiction to give such explanation or illustration. This rule may be, and often is, rendered obscure by attempts at definition of it, serving to create doubts instead of removing them, but an illustration like the one given in this case by referring to the conviction upon which the jurors would act in the weighty and important concerns of life would be likely to aid them to a right conclusion when an attempted definition might fail. If the evidence produced be of such convincing character that they would unhesitatingly be governed by it in such weighty and important matters, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty which attends all human evidence. The instruction in the case before us is as just a guide to practical men as well can be given, and if it were open to criticism it could not have misled the jury.

"The instruction is not materially different from that given by Lord Tenterden, as repeated and adopted by Chief Baron Pollock, in Rex v. Muller. 'I have heard,' said the chief baron, addressing the
196 jury, 'the late Lord Tenterden frequently lay down a rule which I will pronounce to you in his own language: "It is not necessary that you should have a certainty which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you should transact your own most important concerns in life."'"

I modify that, as I modified the other instruction in that regard.

"'"No doubt the question before you to-day, involving as it does the life of the prisoner at the bar, must be deemed to be of the highest importance, but you are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life. To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect."'"

Now, in this case, if your minds are brought to the condition defined as what is meant by establishing the case beyond a reasonable doubt, as

I have defined it to you, your duty is to convict the defendant, because upon such a state of case as this, when it exists, the proof shows the existence of a murder, and if you find that state of case existing you will sign this blank form upon the back of the indictment, which expresses your verdict as being one that finds the defendant guilty of murder.

Now, gentlemen, take the evidence, find what the truth is, take the law as I have given it to you, and apply it to that truth, and come to a conclusion, and such a conclusion as your judgment will dictate, and a conclusion that will satisfy your consciences and your minds, first, that this man is dead, and, secondly, that he died by violence of the kind named in the indictment, and, third, that he was the man named in the first count, or that he was a man unknown, or whose name was unknown, and that he was the man who was killed, and that he was killed

197 willfully and with malice aforethought, and that the defendant was the man who was the author of that crime.

Gentlemen, you will take the indictment and make up your verdict.

Mr. J. K. BARNES (of counsel for the defendant). I have several exceptions I desire to file.

The COURT. Yes, sir.

5:30 o'clock p. m.

198 To which charge of the court the defendant offered and filed the following exceptions before the jury retired and in their presence:

1st. Excepts to charge of court as to jurisdiction and evidence necessary to sustain jurisdiction.

2nd. As to identification of remains and authority read by court, also reference to the clothing, also King vs. Klue; also reading of Webster's case mentioned by Mr. Mills, &c., no particular case mentioned; also as to facts extraneous to the body—the pants, for instance.

3rd. As to corpus delicti.

4th. As to malice, &c.

5th. As to character of crime charged in the indictment.

6th. All of the charge as to confession in conjunction with proof as to corpus delicti, wounds extraneous of the body, &c.; also hearing of a gunshot in direction of where body was found; whole charge as to confession on the ground that the law was not properly summed up by the court in behalf of the defendant.

7th. As to credibility of witnesses; remarks as to denunciation of witnesses.

8th. As to defendant's testimony of the whole.

9th. As to statements made before commissioner read by defendant to contradict testimony of Government witnesses in the final trial.

10th. Charge as to reasonable doubt.

199 Before the jury retired to consider of their verdict the defendant excepted to a statement made by J. B. McDonough, esq., assistant United States district attorney, made in his closing argument to the jury, to the effect that defendant's counsel assumed in argument that defendant had a right to kill the man because he was crazy, notwithstanding defendant's counsel disclaimed taking any such position either in argument or otherwise. Mr. McDonough denied at the time having claimed that

Mr. Barnes had taken that position, and the court remarked at the time that no such inference was intended by Mr. McDonough. Said exception is in words and figures as follows:

During the argument of Mr. McDonough he assumed the position that counsel for defendant assumed in argument that defendant had a right to kill the negro because he was crazy. Barnes, for defendant, stated that counsel for defendant assumed no such position. Court interrupted Barnes and said Mr. McDonough did not assume any such position, but only drew an inference from defendant's counsel's argument.

To this defendant excepted.

200 Whereupon the jury retired to consider their verdict, and after deliberation for some time, returned into court and were further charged as follows, to wit:

201 At 3.00 o'clock, June 11, A. D. 1895, the jury in this case appeared in the court room, when the following proceedings were had, to wit:

The COURT. Mr. Foreman, the court is informed by a note coming from you that the jury want to be instructed on the confessions of the defendant. Is that correct?

The FOREMAN. Yes, sir.

The COURT. The court told you yesterday that there are two propositions involved in this case, the first one being that a crime such as is charged in the indictment was committed by some one. That involves the fact of the death of the man alleged to have been killed, his death by violence of the kind named in the indictment, and that that was done willfully and with malice aforethought. That makes out what is called in the law the body of the crime, the fact that a crime such as is charged has been committed. The rule of law is if the proof shows that fact, shows proof of that proposition beyond a reasonable doubt, that you may then take the confession of the defendant, and if that confession or admission is free and voluntary, it is classified in the law as entitled to credit, is recognized as of that character that you may regard it

202 as sufficient to warrant a conviction alone. But there, of course, always is in every case if the proposition is true, whether it is in the shape of admissions or confessions, or in any other shape, other facts and circumstances corroborating that proposition. Now, in this case, you have a right to take into consideration the evidence which proves the corpus delicti outside of the confession, that establishes the fact that the man named in the indictment, or the man whose name was unknown, was killed in such a way as to make it murder, according to the definition I gave you yesterday. I say you have a right to take the facts and circumstances which show that state of case in corroboration of the confession. But if the confession stands alone, that proposition making the corpus delicti having been otherwise proven, by other testimony than the confession, the death of the man by violence, and that it was done willfully and with malice aforethought, that confession if free and voluntary, or that admission—and the term admission more properly applies to it when it is made to friends in confidence, these statements alleged to have been made to friends and acquaintances of the defendant—that standing alone, the corpus delicti having been otherwise proven, may be sufficient

to warrant conviction, but I say you are to look to the other facts and circumstances which establish that corpus delicti, and you may use these facts and circumstances in corroboration of the confession.

Now, the law says that when confessions are free and voluntary—and that means that they have not been induced from the defendant by a promise of favor or reward, or they have not been extorted or forced from him by threats of violence—if there is nothing of that kind that operates upon his mind to induce him to make statements which come in the shape of admissions, but he makes them, either in the confidence of friendship or because he is prompted by a spirit of race hatred or braggadocio, and regards it as a feather in his cap to have killed a man of the
203 colored race, or for any other reason—if he makes them without the influence of fear operating upon his mind, or without the inducement of hope influencing him to make these statements, they stand in the law as free and voluntary admissions, and when they stand that way here is the character that the law gives to them:

"Subject to these cautions in receiving them and weighing them, it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law. Their value depends upon the supposition that they are deliberate and voluntary."

Again, upon that subject:

"A confession voluntarily and freely made, without any undue influence, is entitled to the highest credit and to great weight as evidence of the facts confessed."

Now, that is the character that that sort of evidence has in the law. It is your duty in this case to take into consideration all the facts and circumstances. You are to see first whether these facts and circumstances, aside from the admissions, establish the proposition that the corpus delicti or the fact that the offense as charged in the indictment has been committed. Then you take the confessions or admissions made to acquaintances or friends by the defendant, or alleged to have been made by him by the witnesses, to show whether he was the author of that act. Then, as a cautionary measure, take the other facts and circumstances, although they may go to prove the first proposition to see whether they corroborate or confirm the statements made by the defendant when he told that he had taken the life of this man by shooting him with a pistol and that he shot him in that manner the second time. See what facts and circumstances corroborate that statement. If there are any, they go to strengthen it, though it may be strong enough without corroborating facts; the corpus delicti being otherwise proven, it may be sufficient to authorize
204 you in believing guilt. You are to take the persons to whom the admissions were made to see whether they were the friends of the defendant, see whether they were made in confidence by him, whether they were made because he believed it might be to his credit to give them to understand that he had been the author of that act; see that they come as free and voluntary statements. If they have that character, then you have given to you by the law the character that you are to attribute to them and the degree of credit that you are to attach to them.

You will take the case, gentlemen, and retire.

Mr. JAMES B. RUTHERFORD (of counsel for defendant). If the court please, I 'ave some exceptions I desire to file.

The COURT. Yes, sir.

205 To which additional charge of the court the defendant offered and filed the following exceptions before the jury retired, and in their presence:

1st. As to confession of defendant being sufficient to warrant conviction alone.

2nd. As to corroboration of confession and the corpus delicti.

3rd. As to free and voluntary confessions when not given from fear or hope, &c.

206 Whereupon the jury again retired to consider their verdict, and after deliberation returned into court the following verdict:

"We, the jury, find the defendant, Eli Lucas, guilty of murder as charged in the 1st count of the within indictment."

(Signed) B. F. HACKETT, *Foreman.*

Whereupon the defendant filed his motion for a new trial, which motion is as follows, to wit:

207 *Motion for new trial.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES)
vs.
ELI LUCAS.)

Now comes the defendant, Eli Lucas, and moves the court to grant him a new trial upon indictment number 112, charging him with the crime of murder, upon the following grounds:

First. Because the court erred in its charge to the jury in reference to jurisdiction by saying to them, "In the first place you are required to find that Kemp, the man killed, or the unknown man, if you believe that his name has not been established, was a negro and not an Indian. That means that he was a citizen of the United States; that means that the court has jurisdiction of the case under the law."

Second. Because the court erred in admitting the character of evidence to the jury to establish jurisdiction, which was given by John Le Flore, that the man called Kemp told him that he came from down about Little Rock.

Third. Because the court erred in allowing the declaration of "a crazy negro" or man to go to the jury for the purpose of establishing jurisdiction or any other fact, and because the same was hearsay.

Fourth. Because the court erred in not charging the jury that if there was any testimony, either hearsay or otherwise, tending to establish the fact that there were parties, citizens of the Choctaw Nation, by the name of Kemp, that this was a circumstance tending to show that the man called Kemp was a citizen of the Choctaw Nation.

Fifth. Because the court erred in not charging the jury that if they had any doubt from the proof in the case as to the citizenship of the man called Levi Kemp it should be resolved in favor of the defendant, and in that event the court would have no jurisdiction to try the case,

208 because it was an admitted fact that the defendant was an Indian and a citizen by blood of the Choctaw Nation.

Sixth. Because the court erred in not charging the jury that, notwithstanding the fact that the deceased may have been a negro by blood, the

Government would be required to further show, beyond a reasonable doubt, that he was not a citizen or an Indian by law of the Choctaw Nation.

Seventh. Because the court erred in its charge to the jury that proof of the corpus delicti and the confessions of defendant were sufficient to warrant conviction without other proof or other corroborative facts and circumstances; and further, that in the charge as to confessions the law was not properly summed up by the court in behalf of defendant.

Eighth. Because the court erred in its charge to the jury as to statements of Government witnesses made before the commissioner and read by defendant to contradict their testimony on the final trial.

Ninth. Because the court erred in its charge to the jury as to reasonable doubt by making the same prolix, argumentative, and misleading.

Tenth. Because the court erred in its charge to the jury in the conclusion thereof by saying, "Now, gentlemen, take the evidence, find what the truth is, take the law as I have given it to you and apply it to that truth and come to a conclusion, and such a conclusion as your judgment will dictate and a conclusion as will satisfy your consciences and your minds, first, that this man is dead; and, secondly, that he died by violence of the kind named in the indictment; and, third, that he was the man named in the 1st count, or that he was a man unknown, or whose name was unknown, and that he was the man who was killed, and that he was killed wilfully and with malice aforethought, and that the defendant was the man who was the author of that crime."

Eleventh. Because the court misinstructed the jury as to the law of the case.

Twelfth. Because the verdict of the jury is contrary to the law and the evidence.

209 Thirteenth. Because the court erred in not allowing the defendant to show that it was currently reported that Jerry Fulsom, a witness for the Government, had been accused, in the neighborhood of where he lived, of killing defendant's uncle, Wilson Hukalocke, at Fulsom's store.

Fourteenth. Because the court erred in allowing Cornelius Brandy to testify in said cause, as the said Brandy had heretofore been convicted upon a charge of larceny in Justice of the Peace John Kennedy's court, of Upper Township, Sebastian County, being one of the counties comprising the judicial district of the United States for the western district of Arkansas.

Fifteenth. Because the court erred in admitting in said case the testimony of C. B. Ward, a witness for the Government, of the purpose to use whom notice was not given defendant by the Government forty-eight hours before the commencement of said trial.

Sixteenth. Because the court erred in permitting J. B. McDonough, the assistant United States district attorney, to state, in his closing argument to the jury, that defendant's counsel assumed in argument that defendant had a right to kill the man because he was crazy, notwithstanding defendant's counsel disclaimed taking any such position either in argument or otherwise.

BARNES & RUTHERFORD,
Attys. for Deft.

(Endorsed on back:) Filed in open court June 27, 1895. S. Wheeler, clerk.

210 Said motion for a new trial coming on to be heard the court doth overrule the same, to which overruling of said motion the defendant then and there excepted.

The opinion of the court overruling said motion is as follows, to wit:

211 *Ruling of court on motion for a new trial.*

TUESDAY, *July 9th, A. D. 1895.*

PARKER, *J.*:

There is a motion for a new trial in this case. The motion embraces a great many causes. There are fifteen causes set up why a new trial should be granted. The first cause relates to the question of jurisdiction. It is:

"Because the court erred in its charge to the jury in reference to jurisdiction by saying to them:

"'In the first place you are required to find that Kemp, the man killed, or the unknown man, if you believe that his name has not been established, was a negro and not an Indian. That means he was a citizen of the United States; that means that the court has jurisdiction of the case under the law.'"

There has been no argument submitted on this motion, and I really do not know what is meant by assigning that as an error. It is about the only way it could be expressed. The allegation in the indictment is that the man killed was a negro and not an Indian. That is an allega-
212 tion that is put in indictments as indicative of the fact that the party is a citizen of the United States. That means a jurisdictional citizen. As a general rule, all persons who are not Indians by blood are citizens of the United States. That is the general rule. There are some exceptions to that rule. There are some rules or principles of law by which some of these tribes make citizens of the United States Indians by adoption, but the general rule is that a man who is not an Indian is a citizen of the United States. Now, then, the question is, first, whether it is sufficient to allege he is a negro and not an Indian. The word "negro" means that he belongs to the African race of people and not the Indian race. The word "Indian," when we speak of it in its ordinary signification, means a person who belongs to that race by blood. That has been interpreted by the Supreme Court of the United States in an opinion delivered by Chief Justice Taney, in a case that went up many years ago from this court. The allegation in the indictment is to the effect that the man killed, under the first count of the indictment, upon which the defendant was found guilty, was a negro and not an Indian. The Supreme Court decides that that allegation is sufficient. If the allegation is sufficient it would be sufficient to prove the fact. In the Westmoreland case, where the allegation was that the party was a white man and not an Indian, the Supreme Court of the United States held that—

"An averment in an indictment for murder that the defendant is 'a white person and not an Indian' is sufficient to show that he is outside of the first two clauses of Rev. Stat., sec. 2146."

The first clause of the Revised Statutes that has reference to this question is one which prohibits courts of the United States from trying a case growing out of an offense committed by one Indian upon another.

It would be sufficient, then, according to the Supreme Court, to
213 show that a party is outside of the first two clauses of the Revised Statutes. Now, further in that case, in speaking of the adoption of an Indian into the Choctaw Nation:

"But it is insisted that article 38 of the treaty with the Choctaws and Chickasaws of April 28, 1866, 14 Stat., 769, 779, provides that 'every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicil, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw,' and that therefore the indictment should also negative the conditions of this article."

The Supreme Court held that it was not necessary that it should negative it.

Now, in this case the charge of the court told the jury that they were to find he was a negro or a citizen of the United States. If they found that, that meant that this court had jurisdiction. There is no question about that being correct. The court's charge to the jury upon the subject was this:

"In the first place, you are required to find that Kemp, the man killed, or the unknown man, if you should believe his name has not been established, was a negro and not an Indian. That means he was a citizen of the United States; that means that the court has jurisdiction of the case under the law. You may find that proposition by circumstances, as well as by what is called positive proof. The fact is, you can only find a man's nationality and his name by circumstances. You may find it proven that way just as any other fact in the case may be proven."

214 Now, it may be said that there are some people who are negroes who are adopted into that nation, but that is the exception to the rule. That is an exception to the general rule. The proof in this case, as we find by proceeding further on, shows that the deceased in this case was not one of that class. It is certainly a correct rule of law when you come to an exception of that character, when you find a man who is a negro by blood, said to be such—and there was no controversy over that—and the Government proves that fact, that makes a prima facie case of jurisdiction, because it shows that he belonged to a race that, as a rule, are not of the Indian race, and they are only of such Indian race by adoption. When that fact is proven it makes a prima facie case of jurisdiction. I can see no error in these propositions of the law that were submitted by the court to the jury. It simply told them what they must find in order to find jurisdiction.

The second cause assigned is:

"Because the court erred in admitting the character of evidence to the jury to establish jurisdiction which was given by John Le Flore that the man called Kemp told him that he came from down about Little Rock."

That was an item of evidence that was objected to after it went to the jury. It was not objected to at the time it was admitted. But even if it had been it is competent testimony, because that declaration was against the interest of the party in that country. It was against his

interest as an adopted citizen of that country. It was what the law calls a self-deserving declaration, and was competent. It is true that an adopted colored man in the Choctaw Nation gets benefits, gets rights and privileges, and a declaration made by him against that interest would be competent. Although it may be hearsay, it is competent, and especially is it competent when it comes from a person that is not
215 alive.

"Declarations of deceased persons made against their interest are, at common law, admissible, although such declarations are offered in suits in which neither such deceased persons nor those claiming under them were or are parties.

"Such declarations against interest are admissible against third parties, even though the declarant himself received the facts on hearsay, provided the person from whom the hearsay springs was competent to speak.

"It is essential, however, that such declarations, when made, should have been self-disserving; i. e., that they should have been, when made, against the pecuniary interests of the declarant. And in a conspicuous English case, when the declaration of a deceased clergyman was offered on this ground to prove a marriage solemnized by him, the limitation just expressed was rigidly enforced."

It is against the interest of a colored man in that country to declare he is not an adopted Choctaw and that he does not belong to that Indian race by adoption. It is clearly against his interest. It is not self-serving. It is self-disserving, and therefore it is competent under the rules of evidence.

The third cause assigned is:

"Because the court erred in admitting the declarations of 'a crazy negro' or man to go to the jury for the purpose of establishing jurisdiction or any other fact, and because the same was hearsay."

Now, of course, that might deceive an appellate court to say he was a "crazy negro." He was called that. They said he was known as that. He was erratic, yet he was able to work. He was able to go about the country and to do chores for people at their houses, and he was,
216 therefore, presumably competent to make these declarations. The declaration, standing as it does here, uncontradicted, would imply that he was a man absolutely insane, or of a man having no knowledge whatever. The proof does not show that, and it is not fair to the record to assert it in that way. Therefore there would be no error upon that point.

The next cause assigned is:

"Because the court erred in not charging the jury that if there was any testimony, either hearsay or otherwise, tending to establish the fact that there were parties, citizens of the Choctaw Nation, by the name of Kemp, that this was a circumstance tending to show that the man called Levi Kemp was a citizen of the Choctaw Nation."

I do not know upon what ground hearsay evidence would be relevant upon that issue—proof that away down in the Choctaw Nation there were Indians by the name of Kemp, an old family of them, and that that should come in as hearsay evidence to establish that fact.

The fifth cause assigned is:

"Because the court erred in not charging the jury that if they had any doubt from the proof in the case as to the citizenship of the man called

Levi Keap it should be resolved in favor of the defendant, and in that event the court would have no jurisdiction to try the case, because it was an admitted fact that the defendant was an Indian and a citizen by blood of the Choctaw Nation."

Now, I do not know of any ground, or any rule of law, that says if you have any doubt upon a proposition that you shall resolve it in favor of the accused party. If they have any reasonable doubt upon a proposition it is the duty of the triers to resolve it in favor of the party accused, but not any kind of a doubt.

The sixth cause assigned is:

"Because the court erred in not charging the jury that notwithstanding the fact that the deceased may have been a negro by blood
217 the Government would be required to further show, beyond a reasonable doubt, that he was not a citizen or an Indian, by law, of the Choctaw Nation."

The court, in substance, in its charge to the jury, charged that.

The seventh cause assigned is:

"Because the court erred in its charge to the jury, that proof of the corpus delicti and the confessions of defendant were sufficient to warrant conviction, without other proof, or other corroborative facts and circumstances, and further that in the charge as to confessions the law was not properly summed up by the court in behalf of the defendant."

The court, after telling the jury very explicitly, and at some length—and in fact these criticisms upon the charge of the court in this case are very curious class of composition. In one breath they declare that the langu'e used is too short, and in another too long, too prolix, to argumentative, too misleading. After charging fully as to what made up the corpus delicti, the court said:

"After that is proven you may take the confessions of the defendant into account for the purpose of showing that he is the party who did that deed, who committed that crime. Then, in this case, upon this point, you are to look at all the facts and circumstances going to show the use of any such deadly violence as is named in this indictment as having been used upon the person of the man found dead, if you find that was the state of case. If you have any evidence showing deadly wounds upon him, though that evidence may be extraneous of the body, because the body is no longer visible, it is gone, it is destroyed, it is decayed, carried off and eaten up, perhaps, by the wild animals, but that fact like any other may be shown by the existence of these circumstances, like the circumstances that go to show identity that may be extraneous
218 of the body, they may consist of evidence in the shape of bullet holes in the clothing of the man—these may be taken into account, together with any other facts and circumstances, such as the hearing of a gunshot in the direction of where the body was afterwards found, or any other facts or circumstances that have been offered before you as evidence to show the use of deadly violence upon the man. When that is proven, if it is established *beyond* a reasonable doubt, then you go to the statements of the defendant, the admissions or confessions of the defendant, to show whether or not he was the author of that crime, the author of that killing, the man who is responsible for that homicide. Now, the law attaches credit of a certain character to evidence of that kind. It

recognizes the fact that the degree of credit due to these confessions or admissions is to be estimated by the jury under the circumstances of each case. The law says, of course, that they are to be freely and voluntarily made. They must have that characteristic. They may be made in confidence to a friend; they may spring from a spirit of bravado that sometimes exists in that country which prompts men, and especially an ignorant man, of one race to boast to his friends of having killed a man of another race. They may spring from that cause. If they are freely and voluntarily made, and they are correctly detailed to you by the witnesses, the law says that they are proof that you may depend upon, and they are proof going to show the identity of the party who committed the crime that may be sufficient for the purpose of showing the identity, subject to these cautions that I have given you, and that is the caution of the law, in receiving and weighing them.

"Reading from Greenleaf on Evidence, vol. 1, sec. 215:

"'Subject to these cautions in receiving and weighing them, it is generally agreed that deliberate confessions of guilt are among the most
219 effectual proofs in the law. Their value depends on the supposition that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, so made by a prisoner, to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime and previous to his examination before the magistrate, are, at common law, received in evidence as among proofs of guilt. Confessions, too, like admissions, may be inferred from the conduct of the prisoner and from his silent acquiescence in the statements of others respecting himself and made in his presence, provided they were not made under circumstances which prevented him from replying to them.'"

"Now, gentlemen, that is the character that they have in the law. When they are freely and voluntarily made, and if the proof otherwise shows the existence of what I have named to you and as known to the law as the corpus delicti, the fact that a crime such as is charged in the indictment was committed by somebody, you may take these confessions to bring that crime home to the defendant. Of course it is always better, when you have any specific kind of testimony, to look through the case to see whether there are any other items of evidence, any other circumstances that go to corroborate these confessions, going to show the opportunity of the defendant to commit the crime; any other fact or circumstance that goes to strengthen his statements made and *and* the confessions. I say that is best as to all kinds of evidence in the case. You have the statements, for example, of a positive eyewitness to a fact. It would be your duty to go through the whole case to see whether there were any other facts corroborating what he says, to substantiate what he says. If there are other circumstances that go to show the truthfulness of a positive statement of that character, then you rely upon it
220 with greater certainty than when you take it alone. And the same with reference to a confession of a man charged with crime freely and voluntarily made. You look through the whole evidence to see what other facts and circumstances there are in the case that go to corroborate what he says."

It is a proposition of the law, as old as the law itself, that when the corpus delicti is proven otherwise than by confessions and admissions that the jury are entitled to credit that as sufficient of itself to warrant a conviction, but the jury were especially admonished here to go to all the other facts and circumstances looking in the same direction to see whether it was corroborated or not.

The eighth cause assigned is:

"Because the court erred in its charge to the jury as to the statements of Government witnesses made before the commissioner, and read by defendant to contradict their testimony on the final trial."

All that the court said upon that subject was to admonish the jury that it might be possible that the clerk of the commissioner, in taking down this testimony as it came secondhand, might get it down wrong; in the hurry of getting it down might get it down improperly. That is what it said substantially. That, I suppose, is a safe rule; I don't know—I should think it would be. It seems to be a natural principle of the law that would go in connection with testimony of that kind.

The ninth cause assigned is:

"Because the court erred in its charge to the jury as to reasonable doubt, by making the same prolix, argumentative, and misleading."

Well, that, of course, is a stereotyped expression that goes into every one of these motions. Whenever there is a motion filed you will find that. I do not know who was the patentee of the expression. Prolix means, "Extended to great length; minute in narration." Well,
221 it may be, but in this case the court simply read the declaration of the Supreme Court of the United States upon the subject of what is meant by a reasonable doubt. Possibly it is prolix. Possibly it is argumentative. Possibly it is longer than it ought to be. But the court simply read that to the jury as the highest authority upon that subject, as the best definition that has been given presumably upon the question. What there is in it that is argumentative in the form of it as given to the jury in this charge it is impossible to understand. It was simply a declaration from the language of the Supreme Court of what is meant by proof beyond a reasonable doubt. What is there, I say, in that that is argumentative, or that could be said to be? Or what is there in it that would be misleading? How could a jury be misled by reading the decision of the court that was read in this case, where it defined correctly and precisely what was meant by the expression, "proof beyond a reasonable doubt"?

The tenth cause set up is:

"Because the court erred in its charge to the jury in the conclusion thereof, by saying: 'Now, gentlemen, take the evidence, find what the truth is, take the law as I have given it to you, and apply it to that truth, and come to a conclusion, and such a conclusion as your judgments will dictate, and a conclusion such as will satisfy your consciences and your minds, first, that this man is dead, and secondly, that he died by violence of the kind named in the indictment, and third, that he was the man named in the first count, or that he was a man unknown, and that he was the man who was killed, and that he was killed willfully and with malice aforethought, and that the defendant was the man who was the author of that crime.'"

Now, I can not see a thing that was wrong in that declaration. The definition of a reasonable doubt had already been given.

The eleventh cause set up is:

222 "Because the court misinstructed the jury as to the law of the case."

That is general.

The thirteenth cause set up is:

"Because the court erred in not allowing the defendant to show that it was currently reported that Jerry Fullsom, a witness for the Government, had been accused in the neighborhood of where he had lived of killing defendant's uncle, Wilson Huk-a-locke, at Fullsom's store."

That is, because the court erred in allowing the defendant to show that Jerry Fullsom, a witness for the Government, had currently been reported to have killed a man. I do not think that requires any comment.

The fourteenth cause assigned is:

"Because the court erred in allowing Cornelius Brandy to testify in said cause, as the said Brandy had heretofore been convicted upon a charge of larceny in Justice of the Peace John Kennedy's court, of Upper Township, Sebastian County, Arkansas, the said county being one of the counties comprising the judicial district of the United States for the western district of Arkansas."

I think that question has already been settled by the Supreme Court of the United States. The principle is enunciated that one court will not enforce the criminal laws of another jurisdiction, and therefore the fact that he has been convicted in another jurisdiction does not go to a man's competency, but to his credibility.

The fifteenth cause set up is:

"Because the court erred in admitting in said case the testimony of C. B. Ward, a witness for the Government, of the purpose to use whom notice was not given defendant by the Government forty-eight hours before the commencement of said trial."

That is upon the principle that that section of the law in refer-

223 ence to this subject requires forty-eight hours' notice. The witness Ward was used in rebuttal in this case, and the court has often decided that that sort of a witness can be used notwithstanding notice has not been given.

The sixteenth cause set up is:

"Because the court erred in permitting J. B. McDonough, the assistant United States district attorney, to state in his closing argument to the jury that defendant's counsel assumed in argument that defendant had a right to kill the man because he was crazy, notwithstanding defendant's counsel disclaimed taking any such position, either in argument or otherwise."

I do not remember that any such position as that existed in the case; therefore I can't pass upon it. Mr. McDonough, I guess, will remember how that was, and when it comes to making up the assignment of errors, if that is put in, we will look to it then.

The motion for a new trial will be overruled.

Mr. JAMES K. BARNES (of counsel for defendant). We desire an exception noted.

The COURT. Yes.

224 Whereupon the said court sentenced the defendant to be hanged upon Tuesday, October 1st, 1895.

The defendant tenders this his bill of exceptions, and prays the same be approved and signed and made a part of the record, which is accordingly done.

I. C. PARKER,
U. S. District Judge, Holding Circuit Court.

225 In the circuit court of the United States for the western district of Arkansas.

UNITED STATES }
vs. } Murder.
ELI LUCAS. }

Assignment of errors.

The defendant files this his assignment of errors committed on the trial of the above cause, to wit:

First. Because the court erred in its charge to the jury in reference to jurisdiction by saying to them:

"In the first place, you are required to find that Kemp, the man killed, or the unknown man, if you believe that his name has not been established, was a negro and not an Indian. That means that he was a citizen of the United States. That means that the court has jurisdiction of the case under the law."

Second. Because the court erred in admitting the character of evidence to the jury to establish jurisdiction which was given by John Le Flore, that the man called Kemp told him that he came from down about Little Rock.

Third. Because the court erred in admitting the declarations of "a crazy negro" or man to go to the jury for the purpose of establishing jurisdiction, or any other fact, and because the same was hearsay.

Fourth. Because the court erred in not charging the jury that if there was any testimony, either hearsay or otherwise, tending to establish the fact that there were parties, citizens of the Choctaw Nation, by the name of Kemp, that this was a circumstance tending to show that the man called Levi Kemp was a citizen of the Choctaw Nation.

226 Fifth. Because the court erred in not charging the jury that if they had any reasonable doubt from the proof in the case as to the citizenship of the man called Levi Kemp it should be resolved in favor of the defendant, and in that event the court would have no jurisdiction to try the case, because it was an admitted fact that the defendant was an Indian and a citizen by blood of the Choctaw Nation.

Sixth. Because the court erred in not charging the jury that, notwithstanding the fact that the deceased may have been a negro by blood, the Government would be required to further show beyond a reasonable doubt that he was not a citizen or Indian by law of the Choctaw Nation.

Seventh. Because the court erred in its charge to the jury that proof of the corpus delicti and the confessions of the defendant were sufficient to warrant conviction without other proof or other corroborative facts and circumstances; and further, that in the charge as to confessions the law was not properly summed up by the court in behalf of the defendant.

Eighth. Because the court erred in its charge to the jury as to the statements of Government witnesses made before the commissioner and read by the defendant to contradict their testimony on the final trial.

Ninth. Because the court erred in its charge to the jury as to reasonable doubt by making the same prolix, argumentative, and misleading; and further, by misinstructing the jury generally as to the law of the case.

Tenth. Because the court erred in its charge to the jury in the conclusion thereof by saying:

"Now, gentlemen, take the evidence, find what the truth is; take the law as I have given it to you and apply it to that truth, and come to a conclusion, and such a conclusion as your judgments will dictate,
227 and a conclusion such as will satisfy your consciences and your minds; first, that this man is dead; and, secondly, that he died by violence of the kind named in the indictment; and, third, that he was the man named in the first count, or that he was the man unknown, and that he was the man who was killed, and that he was killed willfully and with malice aforethought, and that the defendant was the man who was the author of that crime."

Eleventh. Because the court misinstructed the jury as to the law of the case. All of which grounds of objection to the charge of the court will more fully appear by an examination of the whole charge presented in the bill of exceptions.

Twelfth. Because the court erred in not allowing the defendant to show that it was currently reported that Jerry Fullsom, a witness for the Government, had been accused in the neighborhood where he lived of killing defendant's uncle, Wilson Huck-a-loche, at Fullsom's store.

Thirteenth. Because the court erred in allowing Cornelius Brandy to testify in said case, as the said Brandy has heretofore been convicted upon a charge of larceny in Justice of the Peace John Kennedy's court of Upper Township, Sebastian County, Arkansas, the said county being one of the counties comprising the judicial district of the United States for the western district of Arkansas.

Fourteenth. Because the court erred in admitting in said case the testimony of C. B. Ward, a witness for the Government, of the purpose to use whom notice was not given defendant by the Government forty-eight hours before the commencement of the said trial, the said C. B. Ward having been introduced in chief by the Government, and objection being made by the defendant to his testimony for the reason heretofore
228 stated, said objection was sustained, and said witness was offered in rebuttal by the Goverament, and permitted to testify over the objection of the defendant.

Fifteenth. Because the court erred in permitting J. B. McDonough, the assistant United States district attorney, to state in his closing argument to the jury that defendant's counsel assumed in argument that defendant had a right to kill the man because he was crazy, notwithstanding defendant's counsel disclaimed taking any such position, either in argument or otherwise, to which the defendant then and there excepted and asked that his exception be noted of record. Mr. McDonough at the time denied having claimed that Mr. Barnes had taken that position, and the court remarked at the time that no such inference was intended by Mr. McDonough.

Sixteenth. It was error for the court to overrule the motion for a new trial and to sentence the said defendant.

Wherefore, the above-stated errors considered, the said defendant prays that the judgment and sentence against him be reversed.

ELI LUCAS.
By BARNES & RUTHERFORD,
His Attorneys.

(Endorsed on back:) Filed July 12, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

229 In the circuit court of the United States for the western district of Arkansas.

UNITED STATES *vs.* ELI LUCAS. } Murder.

Petition for writ of error.

To the Clerk of the Circuit Court of the United States for the Western District of Arkansas:

Your petitioner respectfully represents that at the May term, A. D. 1895, of this court he was convicted on an indictment charging him with the crime of murder, and that the said court has pronounced judgment and sentence on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial of said cause there is great and manifest error, to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error to the Supreme Court of the United States be issued by you under the seal of the said circuit court in said cause, removing the said cause and the record therein to the said Supreme Court in order that the same may be there reexamined, and, if error be found, that the judgment and sentence against him therein may be reversed.

ELI LUCAS.
By BARNES & RUTHERFORD,
His Attorneys.

230 In the circuit court of the United States for the western district of Arkansas.

UNITED STATES *vs.* ELI LUCAS. } Murder.

Poverty affidavit.

I, Eli Lucas, the defendant in the above-entitled cause, do solemly swear that I am not possessed of sufficient means, and am unable to procure the same, so as to prosecute the writ of error taken in the said cause to the Supreme Court of the United States, and am not worth ten dollars ($10.00) over and above my wearing apparel.

I therefore pray the said writ of error may be prosecuted by me in forma pauperis.

ELI LUCAS.

Subscribed and sworn to before me this 12th day of July, A. D. 1895.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

231 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the Circuit Court for the Western , greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between United States, plaintiff, and Eli Lucas, defendant, a manifest error hath happened, to the great damage of the said Eli Lucas, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13 day of July, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN WHEELER,
Clerk of the U. S. Circuit Ct. for Western Dist. of Ark.
By I. M. DODGE, *D. C.*

Allowed by—
Justice of the Supreme Court of the United States.

232 UNITED STATES OF AMERICA, *ss:*

To Jas. F. Read, esq., U. S. Attorney for the Western Dist. of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western dist. of Ark., wherein Eli Lucas plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. C. Parker, U. S. dist. judge for the western dist. of Arkansas, holding circuit court this 13 day of July, in the year of our Lord one thousand eight hundred and ninety-five.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Ct.

On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, the subscriber, , and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I hereby accept service of the within citation and waive service by an officer.

JAS. F. READ, *U. S. Atty.*

233 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record and proceedings in the case of U. S. vs. Eli Lucas, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 19 day of July, A. D. 1895.

[SEAL.]

STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsed on cover:) Case No. 15982. Term No. 692. Eli Lucas, plaintiff in error, vs. The United States. W. Arkansas, C. C. U. S. Filed August 6th, 1895.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ELI LUCAS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 692.

MOTION TO ADVANCE.

RECEIVED
OCT 12 1895
MOTHER'S
COPY

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ELI LUCAS, PLAINTIFF IN ERROR, }
v. } No. 692.
THE UNITED STATES. }

MOTION TO ADVANCE.

The plaintiff in error was indicted in the circuit court of the United States for the western district of Arkansas at the February term, 1895, for having murdered one Levy Kemp, a negro and not an Indian, on October 1, 1894, at the Choctaw Nation, in the Indian country. He was tried, found guilty, and on July 9, 1895, sentenced to be hanged.

The Solicitor-General, on behalf of the United States, respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the term as may be convenient to the court.

Notice of this motion has been served on the plaintiff in error and his counsel in the court below, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

Office Supreme Court U. S.
FILED.
NOV 19 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ELI LUCAS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 692.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ELI LUCAS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 692.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Plaintiff in error was indicted in the circuit court of the United States for the western district of Arkansas at the February term, 1895. There were two counts in the indictment. The first count charged him with having murdered Levy Kemp, a negro and not an Indian. (Rec., p. 1.)

The jury found him guilty of murder, as charged in the first count, and he was sentenced to be hanged. (Rec., p. 5.)

The record, like all others which come from that court, sets out all the testimony just as it was taken down, in questions and answers, together with the colloquies between the court and counsel.

There was competent evidence which went to the jury tending to sustain all the averments in the indictment.

There are sixteen assignments of error. Of these only five are predicated on the admission or exclusion of evidence. All of the facts necessary to show the bearing of these exceptions fully could have been set out on a few pages of the record. The evidence in the record covers 102 pages.

POINTS AND ARGUMENT.

I.

The first assignment is as follows:

> Because the court erred in its charge to the jury, in reference to jurisdiction, by saying to them:
>
> "In the first place, you are required to find that Kemp, the man killed, or the unknown man, if you believe that his name has not been established, was a negro, and not an Indian. That means that he was a citizen of the United States. That means that the court has jurisdiction of the case under the law." (Rec., p. 133.)

This assignment is based upon the first exception to the charge, which is as follows:

> Excepts to charge of court as to jurisdiction and evidence necessary to sustain jurisdiction. (Rec., p. 121.)

This exception is too indefinite. (*Thiede* v. *Territory of Utah*, 159 U. S.)

The indictment, in both counts, charged that the person killed was a negro, and not an Indian. (Rec., pp. 1, 2.)

The court charged as follows:

> In the first place, you are required to find that Kemp, the man killed, or the unknown man, if you should believe his name has not been established, was a negro and not an Indian. That means he was a citizen of the United States; that means that the court has jurisdiction of the case under the law. You may find that proposition by circumstances, as well as by what is called positive proof. The fact is, you can only find a man's nationality and his name by circumstances. You may find it proven that way just as any other fact in the case may be proven. If you find he occupied that status, then this court has the right to hear and determine the case upon its merits; that means jurisdiction to try the case. You have a right upon that proposition to take into consideration the facts that have gone to you for the purpose of showing who he was and where he came from. It is sufficient if the Government makes out a case of jurisdiction that has not been refuted, that has not been overthrown. Of course it is required to prove this as it is required to prove any other fact, beyond a reasonable doubt. (Rec., p. 109.)

The only incorrect statement made was "that means he was a citizen of the United States." This was surplusage. If the jury found he was a negro, and not an Indian, the jurisdictional fact was made out, and the court charged correctly that it took this to sustain the jurisdiction. Of course, he may have been not an Indian, and a negro, and yet not a citizen of the United States.

This, however, would not affect the jurisdiction. So the erroneous statement, that a person who was a negro and not an Indian was necessarily a citizen of the United States, did not affect in any way what had been correctly charged in respect of the jurisdictional facts, which the jury had to find before they could convict.

II.

The second assignment is as follows:

> Because the court erred in admitting the character of evidence to the jury to establish jurisdiction which was given by John Le Flore, that the man called Kemp told him that he came from down about Little Rock. (Rec., p. 133.)

The only objection taken to the testimony of this witness was as follows:

> Q. Were you ever acquainted with Levi Kemp before he came to your place?
>
> A. No, sir.
>
> Q. Had he ever lived in that country?
>
> A. He told me he had not.
>
> Mr. JAMES K. BARNES (of counsel for defendant). I object to that question, and I object to the answer, and I ask that it be excluded from the jury. He asked the witness what this man told him, and he is relating that.
>
> The COURT. What was the question?
>
> Mr. JAMES K. BARNES (of counsel for defendant). He asked the witness if Kemp lived in that country, and he said he didn't know.
>
> The WITNESS. I said he told me that he did not.
>
> The ASSISTANT DISTRICT ATTORNEY. He said he did not.

Mr. JAMES K. BARNES (of counsel for defendant). And he said he came from Little Rock, did he?

The WITNESS. That is what he told me.

The COURT. I think that is competent.

Mr. JAMES K. BARNES (of counsel for defendant). I object to that, and I ask that the objection be noted.

The ASSISTANT DISTRICT ATTORNEY. That was some time ago. He did not object to all of that.

The COURT. Yes; you did not object at the time. It went in, and you did not object. That was about the first question that was asked and answered.

Mr. JAMES K. BARNES (of counsel for defendant). I did not understand it that way.

The ASSISTANT DISTRICT ATTORNEY. He went on to say that he came from near Little Rock—what was that place?

The WITNESS. He said a place near Little Rock, near a place called Mount Kamp.

Mr. JAMES K. BARNES (of counsel for defendant). I object to everything about what the man said about where he came from and who he was. (Rec., pp. 8, 9.)

It will be observed that the assignment is confined to the declaration of Kemp "that he came from down about Little Rock."

The objection taken was to the answer that Kemp told witness that he had not lived in that country, and this was asked to be excluded. There is no assignment of error to the action of the court in respect of this. A general objection was made as follows:

> I object to everything about what the man said about where he came from and who he was.

This was not made to any particular question or answer. There was nothing for the court to act on. He did not

ask that the statement about coming from Little Rock be withdrawn from the jury.

This witness had been previously questioned as follows:

> Q. What name did he give you as his name?
> A. Levi Kemp.
> Q. Where did he say he was from?
> A. He said he was from near Little Rock; a place named Mount Kamp.
> Q. Little Rock, Arkansas?
> A. Yes, sir. (Rec., p. 7.)

The evidence went to the jury without exception.

III.

The third assignment is as follows:

> Because the court erred in admitting the declarations of "a crazy negro" or man to go to the jury for the purpose of establishing jurisdiction or any other fact, and because the same was hearsay. (Rec., p. 133.)

The assignment is uncertain, and refers to no part of the record identifying the declaration. It does not show what the declaration was in respect of jurisdiction or "any other fact." Rule 35 requires as follows:

> When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected.

There is no exception in the record upon which this assignment is based. The only exception is that set out under assignment two, and that was made after the evidence had been admitted without objection, and no request was made to withdraw the evidence from the

jury. There is no exception anywhere in the record to any declaration on the ground that it was made by "a crazy negro." There is no evidence that Kemp was "a crazy negro." He is spoken of by several of the witnesses as "a crazy negro," but there was no evidence before the jury that he was crazy, and the record shows abundantly that he worked and went about like other people. No such objection as this was ever called to the attention of the trial court while the evidence was being given.

IV, V, VI.

The fourth assignment is as follows:

> Because the court erred in not charging the jury that if there was any testimony, either hearsay or otherwise, tending to establish the fact that there were parties, citizens of the Choctaw Nation, by the name of Kemp, that this was a circumstance tending to show that the man called Levi Kemp was a citizen of the Choctaw Nation. (Rec., p. 133.)

The fifth assignment is as follows:

> Because the court erred in not charging the jury that if they had any reasonable doubt from the proof in the case as to the citizenship of the man called Levi Kemp it should be resolved in favor of the defendant, and in that event, the court would have no jurisdiction to try the case, because it was an admitted fact that the defendant was an Indian and a citizen by blood of the Choctaw Nation. (Rec., p. 133.)

The sixth assignment is as follows:

> Because the court erred in not charging the jury, that notwithstanding the fact that the deceased may

> have been a negro by blood, the Government would be required to further show beyond a reasonable doubt that he was not a citizen or Indian by law of the Choctaw Nation. (Rec., p. 133.)

There was no request to the court to charge, as set out in these assignments.

There were no requests for instructions. (Rec., p. 12.)

It is no ground for reversal that the court omitted to give instructions when they were not requested by the defendant. It is sufficient that the court give no erroneous instructions. (*Isaacs* v. *United States*, 159 U. S.)

VII.

The seventh assignment is as follows:

> Because the court erred in its charge to the jury that proof of the corpus delicti and the confessions of the defendant were sufficient to warrant conviction without other proof or other corroborative facts and circumstances; and further, that in the charge as to confessions the law was not properly summed up by the court in behalf of the defendant. (Rec., p. 133.)

This assignment can be based only upon the following exceptions:

> First. As to confession of defendant being sufficient to warrant conviction alone.
>
> Second. As to corroboration of confession and the corpus delicti.
>
> Third. As to free and voluntary confessions when not given from fear or hope, etc. (Rec., p. 124.)
>
> Sixth. All of the charge as to confession in conjunction with proof as to corpus delicti, wounds extraneous of the body, etc.; also hearing of a gun-

> shot in direction of where body was found; whole charge as to confession on the ground that the law was not properly summed up by the court in behalf of the defendant. (Rec., p. 121.)

Rule 35 requires as follows:

> When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused.

The exceptions on which this assignment is predicated are vague and insufficient. The first, second, and third are taken "as to" portions of the charge which are not identified. If the parts meant can be certainly ascertained the exceptions do not in any respect indicate the ground of objection.

The sixth exception is even more uncertain. It involves different propositions. The trial judge could not from it get any idea of the grounds of objection. It was manifestly made, not for the purpose of getting errors corrected and having a proper charge, but to secure reversal. It was made for the Supreme Court and not the trial court, which is totally apart from the purpose for which exceptions—which are required to be made before the jury retire—are permitted. (*Thiede* v. *United States*, 159 U. S.)

However, it is insisted that the charge was correct on all of the points specified. It was as follows:

> Now, then, if you find the existence here of those things that I have enumerated, to wit, the fact that this man—either known by the name of Levy Kemp, as set out in the first count in the indictment,

or that his name was unknown—is dead, that he died by violence of the kind named in the indictment or kindred violence, and that that was inflicted willfully and with malice aforethought, that makes out what is called in the law the corpus delicti of the crime, or of the charge that is set out in this indictment—the fact that a crime such as is charged was committed; that he is dead; that he died by violence; that he died because that violence was used willfully and with malice aforethought upon him; and if so, that shows that a crime, such as is charged in this indictment, was committed. The law says that that general proposition is first to be established either by positive proof or by circumstances outside of the confession of the defendant. Now, the declaration that you can not convict a man upon a confession alone has been misunderstood. It has been taken as a true proposition that if there was no other evidence in the case but a confession that you could not convict the man. Well, you can not prove the corpus delicti by a confession. If a man comes into court and says, "I murdered a man," and there is no evidence that anybody has been murdered, there is no evidence that anybody has been killed but that man's statement, the law says it is not sufficient to convict upon that. But if the proof outside of that confession, the circumstances or facts, shows that a crime has been committed, the evidence in the case shows the use of deadly violence upon the party killed, and the party was killed, and the party named in the case here as having been the party that was killed, if these facts and circumstances show that, if that is established beyond a reasonable doubt, then you may take the confession of the defendant that he was the party who killed that man, who

committed that crime, who did that deed, as being sufficient evidence to authorize you to convict. (Rec., pp. 115, 116.)

The court told you yesterday that there are two propositions involved in this case, the first one being that a crime such as is charged in the indictment was committed by some one. That involves the fact of the death of the man alleged to have been killed, his death by violence of the kind named in the indictment, and that that was done willfully and with malice aforethought. That makes out what is called in the law the body of the crime, the fact that a crime such as is charged has been committed. The rule of law is, if the proof shows that fact, shows proof of that proposition beyond a reasonable doubt, that you may then take the confession of the defendant, and if that confession or admission is free and voluntary, it is classified in the law as entitled to credit, is recognized as of that character that you may regard it as sufficient to warrant a conviction alone. But there, of course, always is in every case if the proposition is true, whether it is in the shape of admissions or confessions, or in any other shape, other facts and circumstances corroborating that proposition. Now, in this case, you have a right to take into consideration the evidence which proves the corpus delicti outside of the confession, that establishes the fact that the man named in the indictment, or the man whose name was unknown, was killed in such a way as to make it murder, according to the definition I gave you yesterday. I say you have a right to take the facts and circumstances which show that state of case in corroboration of the confession. But if the confession stands alone, that proposition making the corpus delicti having been otherwise proven, by other testimony than the confession,

the death of the man by violence, and that it was done willfully and with malice aforethought, that confession, if free and voluntary, or that admission—and the term admission more properly applies to it when it is made to friends in confidence, these statements alleged to have been made to friends and acquaintances of the defendant—that standing alone, the corpus delicti having been otherwise proven, may be sufficient to warrant conviction, but I say you are to look to the other facts and circumstances which establish that corpus delicti, and you may use these facts and circumstances in corroboration of the confession.

Now, the law says that when confessions are free and voluntary—and that means that they have not been induced from the defendant by a promise of favor or reward, or they have not been extorted or forced from him by threats of violence—if there is nothing of that kind that operates upon his mind to induce him to make statements which come in the shape of admissions, but he makes them either in the confidence of friendship or because he is prompted by a spirit of race hatred or braggadocio, and regards it as a feather in his cap to have killed a man of the colored race, or for any other reason—if he makes them without the influence of fear operating upon his mind, or without the inducement of hope influencing him to make these statements, they stand in the law as free and voluntary admissions, and when they stand that way here is the character that the law gives to them:

"Subject to these cautions in receiving them and weighing them, it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law. Their value depends upon the supposition that they are deliberate and voluntary."

Again, upon that subject:

"A confession voluntarily and freely made, without any undue influence, is entitled to the highest credit and to great weight as evidence of the facts confessed."

Now, that is the character that that sort of evidence has in the law. *It is your duty in this case to take into consideration all the facts and circumstances. You are to see, first, whether these facts and circumstances, aside from the admissions, establish the proposition that the corpus delicti or the fact that the offense as charged in the indictment has been committed. Then you take the confessions or admissions made to acquaintances or friends by the defendant, or alleged to have been made by him by the witnesses, to show whether he was the author of that act. Then, as a cautionary measure, take the other facts and circumstances, although they may go to prove the first proposition, to see whether they corroborate or confirm the statements made by the defendant when he told that he had taken the life of this man by shooting him with a pistol and that he shot him in that manner the second time.* See what facts and circumstances corroborate that statement. If there are any, they go to strengthen it, though it may be strong enough without corroborating facts; the corpus delicti being otherwise proven, it may be sufficient to authorize you in believing guilt. You are to take the persons to whom the admissions were made to see whether they were the friends of the defendant, see whether they were made in confidence by him, whether they were made because he believed it might be to his credit to give them to understand that he had been the author of that act; see that they come as free and voluntary statements. If they have that character, then you have given to you by the law the character

that you are to attribute to them and the degree of credit that you are to attach to them. (Rec., pp. 122, 123.)

When, as in this case, the body is found and identified, and circumstances tending to connect a defendant with the crime are established by other witnesses, his confession is admissible. (The *People* v. *Badgley*, 16 Wend., 59; *United States* v. *Williams & Cox*, 1 Clifford, 5, 25, 27; Wharton's Criminal Law, I, § 683; Rice on Evidence, Vol. III, § 296; Bishop on Criminal Procedure, § 1058; *Isaacs* v. *United States*, 159 U. S.)

VIII.

The eighth assignment is as follows:

Because the court erred in its charge to the jury as to the statements of Government witnesses made before the commissioner and read by the defendant to contradict their testimony on the final trial. (Rec., p. 134.)

This assignment is based upon the following exception:

Ninth. As to statements made before commissioner read by defendant to contradict testimony of Government witnesses in the final trial. (Rec., p. 121.)

Both the assignment and the exception are uncertain and insufficient (*Thiede* v. *United States*, 159 U. S.).

The court charged as follows:

Now, in reference to these statements and efforts that have been made to contradict the statements of witnesses by showing that they made statements before the commissioner inconsistent, as it is claimed, with the statements made here on the witness stand.

> You will bear in mind that the statements offered as contradictory statements come to you secondhand. They come to you as the result, first, of the hearing of the man who wrote them down, the clerk for the commissioner; and, secondly, as the result of his correct work after he has heard it. Now, here are two processes that he must employ upon these statements before they are reduced to writing, and you may consider that he may not have heard them, in the hurry of business, correctly, and if he did hear them, in his effort to get down what was said he may have made a mistake as to what was said. You will take the statements of these witnesses as to whether they said these things or not, their memory as to what they said, and their apparent integrity and apparent truthfulness and consistency in saying whether they made these statements or not. That evidence, when you come to use it as a contradicting method, is one that may be employed, but it is to be employed with this caution that I have given you. (Rec., pp. 118, 119.)

In this the court simply cautioned the jury, and mentioned the fact that these reports were made first by being taken down in shorthand, and that they were then transcribed.

Anyone who has had experience with stenographic reporters knows that a great many errors necessarily occur in taking down the words, and also that they are likely to occur, and frequently do occur, in transcribing from notes. The finished product, representing the statements of witnesses, goes through two processes. It is the duty of a jury to reconcile testimony, and where witnesses are unimpeached and their statements are apparently candid, it is proper that allowance should be made

for possible errors occurring in the way pointed out. After all, this was simply a caution to the jury, and the determination of all the facts upon all the testimony was left entirely to them.

IX.

The ninth assignment is as follows:

> Because the court erred in its charge to the jury as to reasonable doubt by making the same prolix, argumentative, and misleading; and further, by misinstructing the jury generally as to the law of the case. (Rec., p. 134.)

This assignment is based on the following exception:

> Tenth. Charge as to reasonable doubt. (Rec., p. 121.)

This assignment, like the others, is uncertain and insufficient. (*Thiede* v. *United States*, 159 U. S.) The exception only goes to the question of reasonable doubt, and does not specify in what respect the charge needs correction.

If judges are prolix and argumentative, and yet commit no error, there is no ground for reversal. It is not said in what respect the charge was misleading.

The objection that the court erred "by misinstructing the jury generally as to the law of the case" is too broad.

On reasonable doubt the court charged as follows:

> Now, gentlemen, the law says that these propositions involved in this case, either by circumstantial testimony or positive proof, or by both combined, must be established to a degree of certainty named in the law as proof beyond a reasonable doubt. It is

right and proper that you should know what is meant by that; what the law means when it says that these things shall be established beyond a reasonable doubt. It does not mean that the case has to be demonstrated like you could demonstrate a proposition in Euclid's geometry or any of the certain sciences, because you can not prove a thing growing out of human conduct in that way. It can not be done as a rule. And when the law commands you to enforce its provisions it does not with one breath command you to do it and with the other set up such a state of case as to make it impossible for you to do so. It contemplates that you can accomplish possibilities or probabilities, but that you can not accomplish that which can not be accomplished by mortal man. You can not demonstrate, I say, a problem growing out of human conduct. The law tells us the degree of certainty that we are to arrive at. It defines it concisely and accurately. It says that we start into the case with the presumption of innocence in favor of the party charged with crime. Now, that means, notwithstanding he is charged with crime, that until the proof shows beyond a reasonable doubt otherwise than that state of innocence, that he is innocent, but when it does show that, this presumption of innocence disappears from the case. It is no longer in it, but the proof drives it out when it goes to that degree of certainty known as proof beyond a reasonable doubt. Let us see for a moment what the Supreme Court of the United States says about this doctrine of proof of a case beyond reasonable doubt, reading from a charge that was given by a court below and approved by the Supreme Court:

"The court charges you"——

Mr. J. K. BARNES (of counsel for defendant). What case is that?

The COURT. *Hauptv. Utah* (120 U. S. Reports)—"that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And, if after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

I say relating to the affairs of other men, because when it comes to our passing upon the question as to whether a case is proven beyond a reasonable doubt, if we are to measure that state of case by a state of case affecting our own affairs, we are more liable to lean toward our own affairs than we would be to remain indifferent, and the proper way, in my judgment, to put the proposition and to do justice to the defendant, is to say if your minds are carried to that degree of certainty that you would be willing to act upon in the more weighty and important matters relating to the affairs of others of importance, then you have no reasonable doubt.

"In many cases," the court says, "if the jury is told that they should be satisfied of the defendant's guilt beyond a reasonable doubt, that that is sufficient. In many cases it may undoubtedly be sufficient. It is simple, and as a rule to guide the jury is as intelligible to them generally as any which could be stated with respect to the conviction they should have of the defendant's guilt to justify a

verdict against him. But, in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension. As a matter of fact it has been the general practice in this country of courts holding criminal jurisdiction to give such explanation or illustration. This rule may be, and often is, rendered obscure by attempts at definition of it, serving to create doubts instead of removing them, but an illustration like the one given in this case by referring to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclusion when an attempted definition might fail. If the evidence produced be of such convincing character that they would unhesitatingly be governed by it in such weighty and important matters, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty which attends all human evidence. The instruction in the case before us is as just a guide to practical men as well can be given, and if it were open to criticism it could not have misled the jury.

"The instruction is not materially different from that given by Lord Tenterden, as repeated and adopted by Chief Baron Pollock, in *Rex* v. *Muller*. 'I have heard,' said the chief baron, addressing the jury, 'the late Lord Tenterden frequently lay down a rule which I will pronounce to you in his own language: "It is not necessary that you should have a certainty which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you should transact your own most important concerns in life."'"

I modify that, as I modified the other instruction in that regard.

> "'' No doubt the question before you to-day, involving as it does the life of the prisoner at the bar, must be deemed to be of the highest importance, but you are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life. To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect.'" (Rec., pp. 119, 120.)

This charge is in accord with the doctrine laid down by this court in *Hopt* v. *Utah* (120 U. S., 430; 440), and the charge approved on this point in *Coffin* v. *United States* (156 U. S., 453).

X.

The tenth assignment is as follows:

> Because the court erred in its charge to the jury in the conclusion thereof by saying:
>
> "Now, gentlemen, take the evidence, find what the truth is; take the law as I have given it to you and apply it to that truth, and come to a conclusion, and such a conclusion as your judgments will dictate, and a conclusion such as will satisfy your consciences and minds; first, that this man is dead; and, secondly, that he died by violence of the kind named in the indictment; and, third, that he was the man named in the first count, or that he was the man unknown, and that he was the man who was killed, and that he was killed willfully and with malice aforethought, and that the defendant was the man who was the author of that crime." (Rec., p. 134.)

This must be taken in connection with all that went before. The law as it had been given is expressly incor-

porated in it. The judge said in this paragraph, "take the law as I have given it to you and apply it to the truth."

There is no error in the part excepted to. It does not purport to cover the entire case and can not be construed except in connection with the law as he had given it.

XI.

The eleventh assignment is as follows:

> Because the court misinstructed the jury as to the law of the case. All of which grounds of objection to the charge of the court will more fully appear by an examination of the whole charge presented in the bill of exceptions. (Rec., p. 134.)

This, it is submitted, is too broad to deserve any consideration whatever.

XII.

The twelfth assignment is as follows:

> Because the court erred in not allowing the defendant to show that it was currently reported that Jerry Fullsom, a witness for the Government, had been accused in the neighborhood where he lived of killing defendant's uncle, Wilson Huck-a-loche, at Fullsom's store. (Rec., p. 134.)

This assignment is based on the following exceptions:

> Q. What was the name of your uncle that was killed up there at Fullsom's store?
> A. Wilson Huckaloche.
> Q. You say he was your uncle?
> A. Yes, sir.
> Q. Were you there when he was killed?

The ASSISTANT DISTRICT ATTORNEY. I do not see the object of going into the killing of the uncle.

The COURT. No.

Mr. JAMES K. BARNES (of counsel for defendant). I want to prove that he went there and got his uncle.

The COURT. Suppose he did, what of it?

The ASSISTANT DISTRICT ATTORNEY. I do not see the connection that has to do with this killing.

Mr. JAMES K. BARNES (of counsel for defendant). I want to show, if your honor please, that it was currently reported there that this man Jerry Fullsom killed this defendant's uncle.

The COURT. Do you claim, as a lawyer, that you can prove a fact in that way—that it is currently reported? What sort of protection would there be for character or anything else if that was the rule? You can hear anything currently reported.

Mr. JAMES K. BARNES (of counsel for defendant). I can prove that he went there and got him at the store.

The COURT. That does not amount to anything. Fullsom himself says he was killed at the store, and that is the end of it. The fact of this witness going there and getting him amounts to nothing, one way or the other. You can not prove by current report, of course, that anybody killed him.

Mr. JAMES K. BARNES (of counsel for defendant). I believe I will save an exception; I don't know. (Rec., p. 94.)

There was no exception taken to the action of the court.

The whole matter was irrelevant and improper. The evidence, even if offered and excluded—and this was not the case—was not admissible. (*Thiede* v. *United States*, 159 U. S.)

XIII.

The thirteenth assignment is as follows:

> Because the court erred in allowing Cornelius Brandy to testify in said case, as the said Brandy has heretofore been convicted upon a charge of larceny in Justice of the Peace John Kennedy's court of upper township, Sebastian County, Ark., the said county being one of the counties comprising the judicial district of the United States for the western district of Arkansas. (Rec., p. 134.)

This assignment is based on the following objection:

> Mr. JAMES K. BARNES (of counsel for defendant). I would like to have a subpœna issued for John Kennedy, justice of the peace.
>
> The COURT. What for?
>
> Mr. JAMES K. BARNES (of counsel for defendant). This witness has been convicted of larceny before Justice Kennedy, and served a term in the county jail.
>
> The COURT. You could not prove it by Kennedy.
>
> The ASSISTANT DISTRICT ATTORNEY. He is no record.
>
> Mr. JAMES K. BARNES (of counsel for defendant). I want him and his record.
>
> The COURT. It does not make a bit of difference if the witness has been convicted. The Supreme Court has settled that question for us. They do occasionally stumble on to something that benefits the Government. The only thing you could use that for would be to affect his credibility. But the Supreme Court has settled the question that you can not use a conviction in another jurisdiction to render a witness incompetent. This court has held otherwise, but of course the Supreme Court has settled that, and we have to submit to it.

Mr. James K. Barnes (of counsel for defendant.) That is in this jurisdiction.

The Court. It is?

Mr. James K. Barnes (of counsel for defendant.) Yes, sir.

The Court. Is his court this court?

Mr. James K. Barnes (of counsel for defendant.) It is not this court, but it is in the western district of Arkansas. I want an objection noted.

The Assistant District Attorney. The counsel stated in the examination of another witness that that witness put himself with this witness because this witness had been convicted and could not be used as a witness, and for that reason I want to call this witness.

The Court. He can be used. You can ask him if he has been convicted of larceny, to affect his credibility. You can prove it by his admission or by the record, either. (Rec., pp. 104, 105.)

The assignment is that there was error in allowing Brandy to testify.

> This witness, at defendant's request, was subpenaed and brought to the trial at the expense of the Government. (Rec., p. 3.)

There was no exception to this witness testifying. The only exception taken was to a refusal of the judge to issue a subpena for Kennedy, and this is not assigned as error.

XIV.

The fourteenth assignment is as follows:

> Because the court erred in admitting in said case the testimony of C. B. Ward, a witness for the Government, of the purpose to use whom notice was not

given defendant by the Government forty-eight hours before the commencement of the said trial. The said C. B. Ward having been introduced in chief by the Government, and objection being made by the defendant to his testimony for the reason heretofore stated, said objection was sustained, and said witness was offered in rebuttal by the Government, and permitted to testify over the objection of the defendant. (Rec., p. 134.)

This assignment is based on the following objections:

Mr. JAMES K. BARNES (of counsel for defendant). We object to the introduction of this witness on the ground that we have not been notified forty-eight hours before this trial.

The COURT. This is in rebuttal?

The ASSISTANT DISTRICT ATTORNEY. Yes, sir.

The COURT. I don't think it requires any notice.

Mr. JAMES K. BARNES (of counsel for defendant). We certainly would have objected to his testifying in chief if he had been offered, and we object to it now, and ask that an objection be noted.

The COURT. Yes. (Rec., p. 99.)

The statute which provides for forty-eight hours' notice does not apply to witnesses called in rebuttal.

The reason for the rule does not exist. It can not be known in advance what witness will be required in rebuttal. Such a construction would defeat justice and make conviction frequently impossible.

For a full discussion of this question, reference is made to the brief of Assistant Attorney-General Whitney, pages 10 to 13, in the case of *Crawford Goldsby, plaintiff in error*, v. *The United States*, No. 620, which the court now has under consideration.

XV.

The fifteenth assignment is as follows:

> Because the court erred in permitting J. B. McDonough, the assistant United States district attorney, to state in his closing argument to the jury that defendant's counsel assumed in argument that defendant had a right to kill the man because he was crazy, notwithstanding defendant's counsel disclaimed taking any such position, either in argument or otherwise, to which the defendant then and there excepted and asked that his exception be noted of record. Mr. McDonough at the time denied having claimed that Mr. Barnes had taken that position, and the court remarked at the time that no such inference was intended by Mr. McDonough. (Rec., p. 134.)

This assignment is based on the following exception:

> Before the jury retired to consider of their verdict the defendant excepted to a statement made by J. B. McDonough, esq., assistant United States district attorney, made in his closing argument to the jury, to the effect that defendant's counsel assumed in argument that defendant had a right to kill the man because he was crazy, notwithstanding defendant's counsel disclaimed taking any such position either in argument or otherwise. Mr. McDonough denied at the time having claimed that Mr. Barnes had taken that position, and the court remarked at the time that no such inference was intended by Mr. McDonough. Said exception is in words and figures as follows:
>
> During the argument of Mr. McDonough he assumed the position that counsel for defendant assumed in argument that defendant had a right to

kill the negro because he was crazy. Barnes, for defendant, stated that counsel for defendant assumed no such position. Court interrupted Barnes and said Mr. McDonough did not assume any such position, but only drew an inference from defendant's counsel's argument.

To this defendant excepted. (Rec., pp. 121,122.)

This assignment seems frivolous. It shows on its face that Mr. McDonough, when his attention was called to what he said, "at the time denied having claimed that Mr. Barnes had taken that position."

The court "remarked at the time that no such inference was intended by Mr. McDonough."

Here was not only a disclaimer in the presence of the jury, but the presiding judge did not think what was said bore the interpretation complained of.

This could not possibly prejudice the jury, and no action of the court was called for. Therefore there could be no error. No exception was then taken. After the argument an exception for the first time was taken. The exception was taken to an alleged statement, notwithstanding the fact that it was disclaimed. The exception was taken to what one lawyer is alleged to have said another lawyer said in his argument. The jury heard it all and could decide the fact. But such comment in argument, upon the argument of an adversary, is no ground for assigning error. But it will be observed that this whole assignment is made up upon what was set out in the exception and that it nowhere appears in the bill of exceptions that any such thing occurred. An exception can not, by its recitals, put facts in the record, even though the exception be a part of the record.